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**THE**  
**AMERICAN STATE REPORTS,**

**CONTAINING THE**

**CASES OF GENERAL VALUE AND AUTHORITY**

**SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN  
DECISIONS" AND THE "AMERICAN REPORTS,"**

**DECIDED IN THE**

**COURTS OF LAST RESORT  
OF THE SEVERAL STATES.**

**SELECTED, REPORTED, AND ANNOTATED**

**By A. C. FREEDMAN,  
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."**

**VOL. XXVII.**

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**AMERICAN STATE REPORTS.**  
**VOL XXVII**





**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**WISCONSIN.**

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**BRAY v. PAROHER.**

[20 WISCONSIN, 12.]

**SOURCE OF FRAUDS — PROMISE TO ANSWER FOR THE DEBT OF ANOTHER.**

— An agreement by a receiver of a corporation, that if a person having a lien on the property in his hands will permit him to sell it and to use the proceeds in the business of the receivership, he will pay for such property, is a promise to answer for the debt of another, because the original debt secured by the lien remains unsatisfied, and the promise of the receiver is collateral thereto.

**SOURCE OF FRAUDS — CONSIDERATION. — A PROMISE TO ANSWER FOR THE DEBT OF ANOTHER** is void, unless made upon some new consideration of benefit accruing or moving directly to the promisor. Therefore, a promise by a receiver of a corporation, in consideration that the lien-holder will permit property subject to the lien to be sold and the proceeds to be used in the business of the receivership, to pay such lien-holder the amount of his lien, is not enforceable, because no benefit or advantage accrues to the receiver.

**ACTION** against defendant to recover the value of certain lumber and shingles upon which plaintiffs had held a lien, and which, subject to the lien, had been the property of the Lincoln Lumber Company, a corporation. This company having become insolvent, the defendant in April, 1884, was appointed its receiver. As such, he applied to the plaintiffs for leave to sell the property, and to use the proceeds in the business of his receivership, and such leave was granted on condition that he should pay plaintiffs the value of the property sold by him. The property was thereupon sold by the receiver, and the proceeds used in the business, which proved unprofitable and unsuccessful, and left the receiver without any means of paying the amount of the plaintiffs' lien. The trial court gave judg-

ment for the defendant, on the ground that his undertaking was to answer for the debt of another, and was void by the statute of frauds.

*Weisbrod, Thompeon, and Harshaw*, for the appellants.

*Bardeen, Mylrea, and Marchetti, and Silverthorn, Hurley, Ryan, and Jones*, for the respondent.

LYON, J. The only interest plaintiffs had in the lumber and shingles in question they acquired by their bill of sale thereof, which was given as security for the indebtedness of the Lincoln Lumber Company to them. They were therefore mortgagees of the property. All the remaining interest therein was in the receiver of the company, which interest he might lawfully dispose of. Hence the leave given by plaintiffs to the receiver to sell the property and use the proceeds in the business of the receivership was not a sale of the property, but only a release of their lien thereon. Its effect was to enable the receiver to dispose of the property absolutely, whereas, but for such release, he could only have disposed of it subject to plaintiffs' lien thereon.

It is very clear to our minds that defendant applied to plaintiffs for leave to sell the mortgaged property, and used the proceeds in the course of his business as receiver, and promised to pay therefor at a future time, not in his personal capacity, but as receiver duly appointed by the court to settle and close the business of the insolvent company; and that the plaintiffs released their lien thereon to the receiver for the benefit of the company and its creditors, and in the first instance accepted the promise of the receiver to pay for the lumber in his official capacity. Such is the plain, unmistakable purport of the transactions between them. Thus far the plaintiffs, and the defendant as receiver only, were the contracting parties.

We assume, however, that the defendant, in his individual capacity, also verbally promised to pay plaintiffs for the lumber and shingles in question at the time above indicated, and that on the faith of such personal promise, and in consideration thereof, plaintiffs released their lien thereon to him as receiver. None of the transactions above mentioned reduced or in any manner affected the demand of plaintiffs against the Lincoln Lumber Company. That remained a valid, subsisting indebtedness against the company. The undertaking of defendant as receiver was to pay that debt to the extent of the value of the property in question thus sold by him. The per-

sonal undertaking of defendant was collateral thereto, and was, substantially, that if as receiver he failed to make such payment, he should be personally liable therefor. Under all the authorities, this is an undertaking to answer for the debt of another. This raises the question whether there is any fact or circumstance in the case which takes this collateral verbal promise out of the operation of the statute of frauds.

It has been held by this court many times that such a verbal promise is void by the statute of frauds (Rev. Stats., sec. 2307), unless it was made upon some new consideration of benefit accruing or moving directly to the promisor. If made upon such consideration, it is not within the statute. The cases which so hold are cited in *Hoile v. Bailey*, 58 Wis. 434, and *Weiss v. Spence*, 59 Wis. 301. The subject is so fully considered in those two and the other cases there cited, and the rule is so firmly established, that further discussion of the subject here is not required. Was there any consideration accruing or moving to the defendant for his personal agreement above mentioned? Defendant was not a creditor of the lumber company. It had none of its property when it failed. Theretofore he had no dealing whatever with it. It does not appear that his compensation as receiver was in any manner affected by the release of plaintiffs' lien on the property. When he surrendered his trust and was discharged therefrom, the court allowed him a gross sum for his services as receiver, but there is no suggestion in the testimony that such allowance was increased because of the release of such lien. In brief, there is no testimony in the case showing, or tending to show, that the defendant personally received anything or derived any benefit whatever from the release by plaintiffs of their lien on the property in question. The release was to the receiver, and the whole consideration therefor accrued to the benefit of the insolvent company and its creditors, who are represented by the receiver, and not to the defendant individually.

Some confusion has crept into the argument of the learned counsel for plaintiffs, growing out of the fact that the receiver and the alleged personal promisor are one and the same person. The case is the same as it would have been had some person other than the defendant been the receiver to whom plaintiffs released their lien on the property, and had the defendant, in consideration of such release, and that alone, also agreed verbally that he would make such payment if the receiver did not. In such case, it cannot be doubted that the

verbal agreement of defendant would be void under the statute, he receiving no consideration for such promise. While in form he would have been surety for the default of the receiver, in substance he would have been surety for a portion of the debt of the lumber company to plaintiffs. Such, in principle, is the present case. It must be held, therefore, that for the reasons stated the agreement sued upon in this action is void, and hence that the nonsuit was properly ordered.

By the Court. The judgment of the circuit court is affirmed.

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**STATUTE OF FRAUDS — PROMISE TO ANSWER FOR THE DEBT OF ANOTHER.** — A collateral undertaking to answer for the debt of another where the original debtor still remains liable is within the statute of frauds: *Dillaby v. Wilcox*, 60 Conn. 71; 25 Am. St. Rep. 299, and note; *Packer v. Benton*, 25 Conn. 242; 25 Am. Dec. 246, and extended note. A promise to pay the debt of another in consideration of a forbearance to attach the property of the debtor, to which neither the promisor nor the creditor has any right, lien, or title, is within the statute of frauds: *Stewart v. Jerome*, 71 Mich. 201; 15 Am. St. Rep. 252, and note. A promise to pay the debt of another is within the statute of frauds unless it is substituted for the original liability: *Brant v. Johnson*, 46 Kan. 389; *Gray v. Herman*, 75 Wis. 453; *Perkins v. Hershey*, 77 Mich. 504.

**STATUTE OF FRAUDS — CONSIDERATION — PROMISE TO ANSWER FOR THE DEBT OF ANOTHER.** — An agreement to accept a draft for the drawer's debt to a third party is within the statute unless upon a new consideration between the promisor and creditor: *Chapline v. Atkinson*, 45 Ark. 67; 55 Am. Rep. 531; *Tindal v. Touchberry*, 3 Strob. 177; 49 Am. Dec. 637, and note; *Durham v. Arledge*, 1 Strob. 5; 47 Am. Dec. 544, and note; extended note to *Union Bank v. Custer*, 55 Am. Dec. 228; *Farnham v. Chapman*, 61 Vt. 206.

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## GESSLER v. GRIM.

[20 WISCONSIN, 21.]

**TRADE-MARKS ARE FOR THE PURPOSE** of pointing out the source, origin, or ownership of the goods to which they are applied, or the dealer's place of business; and they usually include the name of the manufacturer or dealer, though they sometimes consist of some novel device, arbitrary character, or fancy word, applied without special meaning, and which by use and reputation comes to serve the same purpose.

**A TRADE MARK OR NAME CAN PROTECT ONLY THE OWNER'S TRADE OR BUSINESS**, and cannot do this to the extent of precluding others from carrying on a like trade or business, provided they do not so carry it on as to mislead incautious persons into the belief that they are dealing with him or purchasing the products of his manufacture.

**TRADE-MARK. — THE WORDS "HEADACHE WAFERS," REGISTERED AND USED** as a part of a trade-mark, cannot give any exclusive right to the use of those words.

**TRADE-MARKS — SIMILARITY OF PACKAGES AND OF DIRECTIONS. —** The fact that one who manufactures and sells wafers for headache puts them up in boxes similar in form, and accompanied by labels containing directions for use substantially identical to those used by another manufacturer, does not constitute an infringement of the latter's trade-mark, where his name is not used, and the true name of the manufacturer and his place of business are printed on each label, and there is nothing to indicate that he is selling his goods as and for the goods manufactured and sold by another person.

**SUIT for an injunction.** The prayer of the complainant was granted. He was a druggist in Milwaukee, manufacturing and selling an alleged medicine for the relief of headache, put up in small boxes, each containing a label printed in black on white paper, in these words "Gessler's Magic Headache Wafers; a positive cure for headache and neuralgia. Never fail if taken as directed. Directions: To prepare the wafer, put it into a glass of water; leave there until it is perfectly soft (about  $\frac{1}{2}$  to 1 minute), place it in the mouth when soft, and swallow with a drink of water; repeat in about an hour if necessary. Man'd by Max Gessler, manuf'g chemist, Milwaukee, Wis. Price 35 cents. For sale at all drug stores." Each box was inclosed in a wrapper on which was printed on the one side the words, "Gessler's Magic Headache Wafers"; and on the other side, "Beware of imitations. These wafers are a guaranteed cure for sick and nervous headache and neuralgia. They are indorsed by physicians, and sold at drug stores everywhere. Price 35c. a box"; and on another side, "Trade-mark registered U. S. Patent Office, Sept. 25, 1888. Manufactured only by Max Gessler, Milwaukee, Wis. General depots, — London, New York, Chicago, Milwaukee, St. Paul. Will be sent prepaid upon receipt of 35 cents, if your druggist does not keep them." The defendant was also a druggist in Milwaukee, engaged in manufacturing and selling wafers put up in boxes of nearly the same size and form as the boxes used by the plaintiff. On the outside of defendant's boxes were labels on which were printed: "W. J. Brown's Alpha Wafers; a guaranteed cure for headache and neuralgia. Never fail if taken as directed. Directions: To prepare the wafer, put it into a glass of water; leave there until it is perfectly soft, about  $\frac{1}{2}$  to 1 minute; place it in the mouth when soft, and swallow with a drink of water. Repeat in about an hour if necessary. Manufactured at Brown's Pharmacy, Marquette, Michigan. Price, 35 cts. For sale at all drug stores." The defendant's boxes were inclosed in wrappers, on

on the one side of which were the words, "Alpha Wafers for Headache and Neuralgia"; and on the other side, "Alpha Wafers are purely vegetable, perfectly harmless, pleasant to take, and are sold on a guarantee. They are indorsed by physicians, and sold at drug stores everywhere. Price 35c. a box. Copyright applied for." And upon another side, in red ink on white paper, were the words, "Manufactured only at Brown's Pharmacy, Marquette, Mich. Will be sent pre-paid upon receipt of 35c. if your druggist does not keep them. General depots, — New York, Chicago, Marquette, St. Paul, Detroit."

*Bloodgood, Bloodgood, and Kemper, for the appellant.*

*Winkler, Flanders, Smith, Bottom, and Vilas, for the respondent.*

CASSODAY, J. "It seems to be the office of a trade-mark to point out the true source, origin, or ownership of the goods to which the mark is applied, or to point out and designate a dealer's place of business, distinguishing it from the business locality of other dealers": *Marshall v. Pinkham*, 52 Wis. 578; 38 Am. Rep. 758. Such trade-mark usually includes the name of the manufacturer or dealer, as the best designation of such source, origin, ownership, or place of business: *Howard v. Park*, N. Y. Sup. Ct. 1882, 21 Am. Law Reg. 644, and note. Sometimes, however, it consists of some novel device, arbitrary character, or fancy word, applied without special meaning, and which by use and reputation comes to serve the same purpose: *In re Trade-Mark "Alpine"*, 29 Ch. Div. 877; *In re James's Trade-Mark (James v. Soulby)*, 33 Ch. Div. 392; *Jay v. Ladler*, 40 Ch. Div. 649; *In re Australian Wine Importers*, 41 Ch. Div. 278; *American S. L. B. Co. v. Anthony*, 15 R. L. 338; 2 Am. St. Rep. 898; *Selchow v. Baker*, 93 N. Y. 59; 45 Am. Rep. 169.

In the case at bar, the plaintiff appears to have rightfully used a label upon a box, and a wrapper on the same, upon which were the words, "Gessler's Magic Headache Wafers, manufactured by Max Gessler, manufacturing chemist, Milwaukee, Wis.," as designating the medicine, prepared and sold by him at his place of business in Milwaukee, as "a positive cure for headache and neuralgia." Such or some other designation is undoubtedly essential to protect and increase his sales of such medicine, which is said to be meritorious. For that purpose courts may protect him against infringement,



and the public against deception, to his damage. But it is only his trade and his business which are thus to be protected by his trade-mark. It gave him no monopoly of the headache business. He had no patent upon the mixture or preparation constituting his medicine. There is no claim that the defendant is precluded from manufacturing or selling such medicine by reason of any contract or trust relationship with the plaintiff. These things being so, the plaintiff had no exclusive right to such mixture, preparation, or sale: *Chadwick v. Covell*, 151 Mass. 190; 21 Am. St. Rep. 442. The defendant, or any other person, therefore, was at liberty to manufacture or sell, as his own, a similar, or even the same, mixture or preparation as a cure for headache, provided he did so in a manner not calculated to mislead incautious persons into the belief that they were buying the medicine manufactured and sold by the plaintiff or some one else: *Chadwick v. Covell*, 151 Mass. 190; 21 Am. St. Rep. 442. See also *Singer Mfg. Co. v. Loog*, L. R. 8 App. C. 15.

The medicine sold by the defendant as a "cure for headache and neuralgia" was put up in boxes similar to those used by the plaintiff, and purported to be "manufactured at Brown's Pharmacy, Marquette, Mich." Upon each box there was a label containing the words, "W. J. Brown's Alpha Wafers," or "Brown's Alpha Headache Wafers"; and the wrapper thereon contained the words, "Alpha Wafers for headache and neuralgia, manufactured only at Brown's Pharmacy, Marquette, Mich." There is no claim that the medicine sold by the defendant was not, in fact, manufactured by Brown in Michigan, as thus stated. As indicated, Brown had the legal right to manufacture such medicine, and sell or authorize the sale of it, as his own, in a manner not calculated to mislead incautious persons. He had the same right to build up a trade for the medicine so manufactured by him, through the agency of the defendant, and have the same protected by his trade-mark, as the plaintiff had: *Brown Chemical Co. v. Myer*, 81 Fed. Rep. 453. There is no claim that the defendant ever used upon any of his boxes, or in any of his labels or wrappers, the words, "Gessler's Magic," or either of those words, in connection with other words or alone, or that he ever in any way indicated that the medicine so sold by him was manufactured by the plaintiff, or in Wisconsin, or by any other person than Brown, at Marquette, Michigan. It is therefore very manifest that the defendant never infringed the plaintiff's

trade-mark, unless he did so by the use of the word "Wafers," or the words "Headache Wafers," or the words "a guaranteed cure for headache and neuralgia," or "a positive cure for headache and neuralgia."

It appears that the plaintiff registered as his trade-mark the words "Magic Headache," but he neither has, nor could have, any exclusive right to those words, in a case like this, by reason of such registration, nor does his counsel claim any: *Trade-mark Cases*, 100 U. S. 82. Besides, as stated, the defendant has never used the word "Magic" at all; and such registration, if valid, would not give the plaintiff any right to the word "Headache" alone, or in some other connection: *Corbin v. Gould*, 133 U. S. 808. True, the directions on the label used by the defendant are substantially the same as the directions on the plaintiff's label. But the plaintiff makes no claim to any copyright upon such directions; and it is not the office of a trade-mark to "authorize a monopoly upon fragments of the language, nor the exclusive appropriation of words in common use descriptive of common objects and qualities. It has often been decided that words which were merely descriptive of the kind, nature, style, character, or quality of the goods or articles sold cannot be exclusively appropriated and protected as a trade-mark": *Marshall v. Pinkham*, 52 Wis. 578; 38 Am. Rep. 756. See also *In re Anderson's Trade-mark*, 26 Ch. Div. 409; *Street v. Union Bank*, 30 Ch. Div. 156; *In re James's Trade-mark (James v. Parry)*, 31 Ch. Div. 840; *Manufacturing Co. v. Trainer*, 101 U. S. 51; *Goodyear etc. Co. v. Goodyear Rubber Co.*, 128 U. S. 598.

We must hold that the words "Headache Wafers," as used by the plaintiff, whether together or separately, are each in common use descriptive of common objects and qualities, and hence he has no exclusive right to the same as a trade-mark; and consequently there has been no infringement of the plaintiff's trade-mark by the defendant.

The learned counsel for the plaintiff contends, however, that assuming that no specific trade-mark had been infringed, yet that the general similarity in appearance between the wafers, boxes, labels, and wrappers used by the defendant and those used by the plaintiff was such as to mislead customers exercising ordinary caution into purchasing "W. J. Brown's Alpha Wafers," or "Brown's Alpha Headache Wafers," as and for "Gessler's Magic Headache Wafers," manufactured and sold by the plaintiff. Undoubtedly, where the similarity is such

as is likely to thus deceive the public to the injury of a private dealer, an injunction may be granted: *McLean v. Fleming*, 98 U. S. 245; *Carson v. Ury*, 89 Fed. Rep. 777; *Frost v. Rindskopf*, 42 Fed. Rep. 408; *Jay v. Ladler*, 40 Ch. Div. 649; *In re Dunn's Trade-mark*, 41 Ch. Div. 489. But where, as here, there is no such substantial similarity, and where there is nothing indicating that the defendant is selling his goods as and for the goods manufactured or sold by the plaintiff, no injunction should be granted: *Liggett & M. Tobacco Co. v. Finzer*, 128 U. S. 182; *Goodyear etc. Co. v. Goodyear Rubber Co.*, 128 U. S. 598; *Corbin v. Gould*, 133 U. S. 308; *Philadelphia N. M. Co. v. Rouse*, 40 Fed. Rep. 585; *Fleischmann v. Starkey*, 25 Fed. Rep. 127; *Brown Chemical Co. v. Myer*, 31 Fed. Rep. 453; *Singer Mfg. Co. v. Loog*, L. R. 8 App. Cas. 15; *In re Anderson's Trade-mark*, 26 Ch. Div. 409; *Street v. Union Bank*, 30 Ch. Div. 156; *In re James's Trade-mark (James v. Parry)*, 31 Ch. Div. 840.

After a careful consideration, we are constrained to hold that the plaintiff made no showing entitling him to an injunction.

By the COURT. — The order of the circuit court is reversed, and the cause is remanded, with direction to dissolve the injunction, and for further proceedings according to law.

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**TRADE-MARKS — PURPOSE OF.** — A trade-mark may consist of a name or device or peculiar arrangement of words, and is used to designate certain goods manufactured by a particular person: *Solis Cigar Co. v. Pass*, 16 Col. 288; 25 Am. St. Rep. 279, and note; *Hoyt v. Hoyt*, 143 Pa. St. 623; 24 Am. St. Rep. 575, and note.

**TRADE-MARKS — PACKAGES IN WHICH ARTICLES WRAPPED, NOT.** — The size, shape, or mode of construction of the package in which goods are placed is not entitled to protection as a trade-mark: *Hoyt v. Hoyt*, 143 Pa. St. 623; 24 Am. St. Rep. 575, and note.

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## BIGELOW v. SICKLES.

[39 WISCONSIN, 22.]

**MALICIOUS PROSECUTION — DAMAGES, WHEN NOT EXCESSIVE.** — A verdict for five thousand dollars for plaintiff, a married woman, is not excessive when the evidence shows that she had for a long time been subjected to outrageous treatment and abuse by the defendants, culminating in her prosecution before a justice of the peace on a charge of adultery.

**MALICIOUS PROSECUTION. — EVIDENCE IS ADMISSIBLE IN FAVOR OF THE PLAINTIFF TO SHOW WHAT OCCURRED** at the time and place when and where she was charged with the commission of the crime of adultery, if those making the charge were there present and claim that they made such charge on account of what there happened. Such evidence is admissible, not because it tends to prove the innocence of the plaintiff, but

because it may tend to show that what occurred did not constitute probable cause for the prosecution, and perhaps it may also be admissible as tending to show innocence of the crime charged.

**PRACTICE — EVIDENCE. —** WHERE A WITNESS BEING SWIFT in responding to a question makes an answer which is not admissible, the party injured thereby should move to strike it out, and failing to do this, cannot afterwards complain.

**MALICIOUS PROSECUTION. —** JUDGMENT OF A JUSTICE OF THE PEACE DISCHARGING THE ACCUSED is *prima facie* evidence of want of probable cause for his prosecution.

*Winkler, Flanders, Smith, Bottum, and Vilas, and Kirkland and Grimm*, for the appellants.

*Rogers and Hall, and George W. Bird*, for the respondent.

ORTON, J. This action is brought by the plaintiff against the defendants for malicious prosecution in making and procuring to be made a complaint on oath before a justice of the peace, charging her, by the name of Clara Robbins Sickles, with having committed adultery. The defendant B. Z. Sickles denied only the malice, want of probable cause, and intent to injure, and alleged good faith and honest belief, and good reason to believe the charge was true, and that he had been so informed, and that her general reputation for chastity was bad. The defendant Zachariah Sickles made the same denials and allegations, and in addition thereto, that he had nothing to do with the prosecution. It appears that the plaintiff was formerly the wife of John Sickles, the brother of B. Z. Sickles, and son of Zachariah; and from the testimony admitted to show the malice of the defendants, it appears that she had been for a long time the subject of their outrageous bad treatment and abuse, to an extent which it is not necessary or proper to mention beyond this general statement.

The jury found a verdict for the plaintiff of five thousand dollars; and it may as well be said here, in answer to the last point made in the brief of the learned counsel of the appellants, that we think the verdict was warranted by the testimony, and is not excessive in amount. The testimony is very voluminous, and there is no occasion for reviewing or making any statement of it on any question going to the merits of the case, and we shall therefore confine ourselves to the assignments of error.

1. It seems that the adultery charged was mainly located at the place and on the occasion of a certain picnic at the house of the witness Charles Woelfer, in the town of Deerfield, about the 1st of September, 1886, and the said witness was

asked as to the plaintiff's conduct, situation, and circumstances while at and about said picnic, in order to show that she was not guilty of the act charged, at least on that occasion. The offer of this testimony was objected to by the learned counsel of the appellants, on the ground that the plaintiff's guilt or innocence was not at issue in the case. The court held that it was proper to offer such proof, it appearing that the transactions at that picnic were the foundation of at least part of the testimony on the examination before the justice. The husband of the plaintiff, John Sickles, was at the picnic, and knew something of the conduct of his wife on that occasion. The defendants state in their answer that B. Z. Sickles was informed by divers persons that the plaintiff was guilty of the charge, and if, in their defense, the grounds of the charge were in part what occurred at that picnic, they must have been informed of it. The defendant B. Z. Sickles testified that he was informed, at least in part, of what occurred there. This evidence scarcely raises the question whether it was proper for the plaintiff to prove her innocence. It was, to the extent offered and admitted, proper to show that nothing occurred at the picnic of a suspicious character, or that constituted probable cause for the complaint. It was incumbent on the plaintiff to prove a want of probable cause, and if her offense was located, even in part, as seems to have been the case, at or about that picnic, or confined to that occasion, she must go there to show the want of probable cause, and show, if she can, that nothing occurred on that occasion to justify or excuse the prosecution. This would seem to be directly within the issue. But the testimony offered may have been proper even to prove negatively that the plaintiff was innocent of the charge. It is proper for the defendant to introduce evidence tending to show that the plaintiff was guilty of the charge, both in proof of probable cause and in mitigation of damages, and without proof that he was informed of the testimony before he made the charge: *Bacon v. Towne*, 4 Cush. 217; *Bell v. Percy*, 5 Ired. 83; *Plummer v. Gheen*, 3 Hawks, 66; 14 Am. Dec. 572; 1 Hilliard on Torts, 471. The guilt of the plaintiff being a proper issue for the defendant, there appears no good reason why the plaintiff may not rebut such evidence given or anticipated, and show that she was innocent of the charge; and if the defendant may do this without showing any previous knowledge of the testimony, why may not the plaintiff? But it seems to be held, in the cases cited by the

learned counsel of the appellants, that such evidence is proper for the plaintiff if the defendants had knowledge of it before they commenced the prosecution: *Cecil v. Clarke*, 17 Md. 508; *King v. Colvin*, 11 R. I. 582. The prosecution seems to have been based, in part at least, on what the defendants had been informed took place at the picnic, and the defendant B. Z. Sickles testified that one Timothy O'Herrin told him that he was at the picnic, and saw the plaintiff and Tony Hoover together under very suspicious circumstances in Woelfer's barn. This certainly put the defendant on inquiry of the plaintiff's conduct at the picnic generally, and it may properly be inferred that he was informed of it. This would make the evidence offered admissible, according to the position assumed by the learned counsel of the appellants.

2. The witness Charles Woelfer testified that the plaintiff was at the picnic, and at one time she was in a tobacco-shed while it rained, with others; and her husband, John Sickles, came in and spoke to her. The witness was then asked by the plaintiff's counsel, "What did he say to her?" This was objected to by the defendants' counsel. The court ruled that the plaintiff's counsel "may show what took place there." This ruling was excepted to by the defendants' counsel. This must have been understood to mean what took place between the plaintiff and others, with a view of showing that nothing improper took place, so far as the plaintiff was concerned, as the court had already ruled that the transactions at the picnic were proper to be shown with that view. It follows, therefore, that the court virtually sustained the objection to the question asked, and suggested the proper question, "What took place there?" But the witness volunteered to answer the question as put by the counsel, rather than to answer the question as modified by the court, and he answered: "Well, he says: 'You G——d d——n w——e! What are you doing in here amongst all these men?' and he kind of made towards her, and she cried, and says she had come out of the rain." This is claimed by the learned counsel of the appellants to be such an error as ought to cause a reversal of the judgment. Besides its immateriality, the learned counsel contend that this improper answer was responsive to the question, and was calculated to prejudice the jury against the defendants, they being the father and brother of the plaintiff's low and brutal husband, and by showing that hatred and abuse of the plaintiff were the characteristics of the whole family. The answer, as well

as the original question, was clearly improper. What the husband said on that occasion had nothing to do with the conduct of the plaintiff in respect to the crime charged, and it can easily be seen how the plaintiff's counsel could use this answer as a make-weight before the jury. There was already too much testimony of this husband's abusive treatment of his wife, the plaintiff, to be justified, except as being connected with that of the defendants, without adding to it this horrible instance of it occurring in the absence of the defendants. But this was not the error of the court. The court ruled correctly. The plaintiff's counsel ought to have withdrawn or modified the question, and perhaps they intended to do so, and would have done so if the witness had not been swift to answer it. But the defendants' counsel omitted to obtain a ruling of the court upon the answer. The court ruled upon the question correctly by suggesting a proper one. That was excepted to, but it was no error. We think that the conditions were such as to impose upon the defendants' counsel the duty to ask the court to strike out the answer, and if that motion had been denied, it would have been an error of which they might have cause to complain.

3. The court instructed the jury that "the judgment of the justice discharging the plaintiff on the examination is *prima facie* evidence of want of probable cause, but it is not conclusive on the subject, and you are to determine the question, considering that fact and all the other evidence bearing on the question," etc. This is assigned as error. The learned counsel of the appellants contend, that although it is proper to introduce the judgment to show the end of the prosecution as a condition precedent to the action, yet it ought not to be used to their disadvantage in the action, in violation of the maxim, *Res inter alios acta alteri nocere non debet*, as it was in a proceeding between the state and the plaintiff, in which the defendants were neither parties in fact nor in interest or privies, and should therefore not be used as evidence in a civil action between themselves and the plaintiffs to prove any issuable fact against them, such as a want of probable cause for instituting the prosecution.

The rule of this most venerable and useful maxim cannot have full application to a prosecution before an examining magistrate in this state. The defendant in this suit was the sole complainant who set the prosecution on foot against the plaintiff, and who had the right to produce the witnesses, and



the issue was, "probable cause for charging the prisoner with the offense"; and the judgment of discharge is based upon a "want of probable cause"; and if "the complainant was willful and malicious and without probable cause," the justice may "enter judgment against the complainant for all the costs of the proceeding, including witness fees": Rev. Stats., sec. 4791. The defendant could scarcely be treated as a stranger to that proceeding and judgment. The justice may adjudicate the same issues that are involved in this case, — willful and malicious prosecution without probable cause, — and enter a money judgment against the defendant. Why, then, should not the same judgment be at least *prima facie* evidence against him of want of probable cause in this action? This is a very different case from that contemplated by the above maxim. It seems to me that there is very strong reason for giving the judgment such an effect in this action. The maxim would have much greater application to a judgment of acquittal after the trial of the plaintiff on indictment or information. The defendant would be much more a stranger to such a proceeding than to such a prosecution before an examining magistrate, and the judgment would not determine the same issues. In the former, it is guilty or not guilty; and in the latter, probable cause or the want of it. In this action, the plaintiff must prove want of probable cause and malice of the defendants in instituting the prosecution. In that case, both of these issues were tried and found against them, and there was both a judgment of discharge and one against the complainant for the costs, according to the above statute. If the defendant was not strictly a party to that proceeding, he was at least privy to and interested in it.

But we think that the authorities preponderate in favor of the introduction of the judgment of discharge, both as evidence that the proceedings were ended, and as *prima facie* evidence of a want of probable cause. Most of the cases cited by the learned counsel of the appellants were of trials and acquittals, and therefore not in point. The briefs on both sides on this question are especially able, learned, and exhaustive. The most creditable elementary works agree upon the proposition that "the discharge of the plaintiff by the examining magistrate is *prima facie* evidence of the want of probable cause, sufficient to throw upon the defendant the burden of proving the contrary": 2 Greenl. Ev., sec. 455; Cooley on Torts, 184;



1 Am. Lead. Cas. 268. The following authorities cited in respondent's brief sustain the proposition with such cogent and sufficient reasons as to commend them to our judgment: *Vinal v. Core*, 18 W. Va. 42; *Nicholson v. Coghill*, 6 Dowl. & R. 13; *Frost v. Holland*, 75 Me. 112; *Jones v. Finch*, 84 Va. 240; *Johnston v. Martin*, 3 Murph. 249; *Bostick v. Rutherford*, 4 Hawks, 88; *Plummer v. Gheen*, 8 Hawks, 68; 14 Am. Dec. 572; *Sappington v. Watson*, 50 Mo. 83; *Brunt v. Higgins*, 10 Mo. 728; *Cassperson v. Sproule*, 89 Mo. 89; *Sharpe v. Johnston*, 76 Mo. 670; 59 Mo. 557; *Straus v. Young*, 36 Md. 254; *Cooper v. Utterbach*, 87 Md. 282; *Cockfield v. Braveboy*, 2 McMull. 270; 89 Am. Dec. 124; *Griffin v. Chubb*, 7 Tex. 608; 58 Am. Dec. 92; *Williams v. Vanmeter*, 8 Mo. 339; 41 Am. Dec. 647; *Johnson v. Chambers*, 10 Ired. 287; *Williams v. Norwood*, 2 Yerg. 229; *Bornheldt v. Spuillard*, 86 La. Ann. 103; *Plassan v. Louisiana Lottery Co.*, 34 La. Ann. 246.

It is unnecessary to review the authorities cited in appellants' brief. Some of them sustain the contention of the learned counsel of the appellants, that the judgment of discharge of the plaintiff by the examining magistrate is not even *prima facie* evidence of want of probable cause; but we cannot concur in the reasons given. One of the reasons given is, that there is no solemnity, certainty, or conclusiveness of such a judgment of an ordinary justice, who is likely to be ignorant or prejudiced. The law presumes the justice both capable and honest, and his judgment in such a case is as conclusive as that of any other court within his jurisdiction. It would hardly do to test the conclusiveness of the judgments of other courts by the same rule of criticism of the judges.

"We must hold, therefore, that the above instruction of the court to the jury, that "the judgment of the justice discharging the plaintiff on the examination is *prima facie* evidence of want of probable cause," was correct, and is sustained by reason and the better authorities.

By the COURT. The judgment of the circuit court is affirmed.

**MALICIOUS PROSECUTION.—EVIDENCE.**—Defendant's conduct and declarations and the situation of the parties may be adduced in evidence to prove malice: *Turner v. Walker*, 3 Gill & J. 377; 22 Am. Dec. 329.

**MALICIOUS PROSECUTION.—CONVICTION OR ACQUITTAL BY JUSTICE OF THE PEACE AS EVIDENCE OF PROBABLE CAUSE.**—A conviction before a justice of the peace is conclusive evidence of probable cause: *Adams v. Bicknell*, 126

Ind. 210; 22 Am. St. Rep. 576, and note. In an action for malicious prosecution, it is proper for the judge to instruct the jury that plaintiff had been acquitted by a justice of the peace: *Ottrell v. Ottrell*, 126 Ind. 181. For monographic note on subject of malicious prosecution, see *Rees v. Hixon*, 26 Am. St. Rep. 128-164.

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## HILLS v. ATLER.

[80 WISCONSIN, 219.]

**DEEDS, REGISTRATION OF, FAILURE TO INDEX.** — Under a statute requiring each register of deeds to keep indexes in which the names of grantors must be entered in their alphabetical order, a tax deed is not regarded as recorded nor as admissible in evidence until it is indexed.

**EJECTMENT.** Plaintiff claimed under a tax title. The conveyances upon which he relied were excluded from evidence because they had not been indexed by the register of deeds, and therefore the plaintiff was nonsuited.

*George L. Williams and O. O. Baker*, for the appellant.

*Loosey and Woodward, and Gardner and Gaynor*, for the respondents.

**CASSODAY, J.** It is in effect conceded that the defendants were in possession of the premises during the times in question. The plaintiff claims title and the right to the possession of the land under and by virtue of the record evidence of the two tax deeds, and the other conveyances and transfers mentioned in the foregoing statement.

We are forced to the conclusion that the record of the quitclaim deed from the county to Weston, Kingston, and Miner, dated January 15, 1872, and the record of the tax deed from the state and county to the same persons, dated January 7, 1874, were properly rejected by the learned trial court. The statute in force at the times mentioned and now is to the effect that each register of deeds shall keep a general index, each page of which shall be divided into nine columns, with heads to the respective columns as therein mentioned, the third of which is the "name of the grantor," the fourth the name of the grantee, the fifth the description of the land, the sixth the nature of the instrument, and the seventh the book and page where recorded; and expressly requires that such register "shall make correct entries in said index of every instrument or writing received by him for record under the respective and appropriate heads, entering the names of the grantors in al-

phabetical order," etc.: Rev. Stats., sec. 759. Such entries operate as constructive notice of all the facts therein contained: *International L. Ins. Co. v. Scales*, 27 Wis. 640; *Pringle v. Dunn*, 37 Wis. 449; 19 Am. Rep. 772; *Maxwell v. Hartmann*, 50 Wis. 637.

The manifest purpose of requiring the names of the grantors to be thus entered in the general index in alphabetical order was to enable persons interested in the title to the land to ascertain by an inspection thereof whether the owner had parted with or been deprived of the title thereof. The name of the owner would be generally known, or could be easily ascertained, and then whether he had transferred or encumbered his title could be readily determined by an inspection of such index, when properly kept. So, by such inspection, it could be readily ascertained whether the county had conveyed or attempted to convey the same for the non-payment of taxes or otherwise.

In respect to the two deeds mentioned, the names of the grantors were never entered in alphabetical order in such general index. On the contrary, the only entries in such alphabetical order were the names of grantees. It is very clear that such entries could be of no service or notice to any one, since no one could be expected to conjecture who might happen to be a grantee in a tax deed, or any other deed. Such should certainly be the rule in respect to tax deeds by which the original owner is divested of his title by proceedings purely statutory, and which, to be available, must be strictly pursued: *Potts v. Cooley*, 51 Wis. 355; *Ramsay v. Hommel*, 68 Wis. 15; *Hiles v. Cate*, 75 Wis. 101. It is to be remembered that a tax-title claimant cannot maintain ejectment until his tax deed is recorded, and that it cannot be considered as recorded until the proper entries of at least the essentials are made in the general index: *Hewitt v. Week*, 59 Wis. 444; *Lander v. Bromley*, 79 Wis. 372; *Cornell University v. Mead*, 80 Wis. 387.

It follows that the nonsuit was properly granted.

By the COURT. The judgment of the circuit court is affirmed.

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DEEDS—REGISTRATION—NECESSITY FOR INDEXING.—In order that a deed may be constructive notice, it must be duly and properly recorded and indexed. The index is an essential part of the record: *Ritchie v. Griffiths*, 1 Wash. 429; 22 Am. St. Rep. 155, and note; extended note to *Green v. Garington*, 91 Am. Dec. 109.

## STATE v. HEINEMANN.

[80 WISCONSIN, 252.]

**CONSTITUTIONAL LAW.**—THE POLICE POWER OF A STATE EXTENDS to all regulations affecting the lives, limbs, health, comfort, good order, morals, peace, and safety of society.

**CONSTITUTIONAL LAW—PHARMACY.**—A STATUTE REQUIRING THAT EVERY PERSON KEEPING A PHARMACY store or shop for retailing, compounding, and dispensing drugs, medicines, or poisons shall be a registered pharmacist, or have in his employ a registered pharmacist, and providing that every person desiring to become a registered pharmacist shall possess certain qualifications prescribed in the act, to be ascertained as therein provided, and that a registration fee, not exceeding two dollars, shall be paid, is constitutional.

PROSECUTION and conviction on a charge of keeping a pharmacy without being or employing a registered pharmacist.

*Henry D. Ryan*, for the appellant.

*Fethers, Jeffris and Fifield*, for the respondent.

CASSODAY, J. The only defense here claimed is, that section 12, chapter 167, Laws of 1882, as amended by section 8, chapter 460, Laws of 1887, imposing the penalty for the offense named, is unconstitutional and void. These acts, at the time named, in effect required that every person keeping a pharmacy store or shop for retailing, compounding, and dispensing drugs, medicines, and poisons should be a registered pharmacist, or have in his employ a registered pharmacist; and that, if such keeper permitted the vending of drugs, medicines, or poisons in his store or place of business, except under the personal supervision of a registered pharmacist or registered assistant pharmacist, then he should be liable to a penalty of fifty dollars. To become such registered pharmacist, or registered assistant pharmacist, required the qualifications prescribed in the acts, to be ascertained as therein provided, and the payment of a registration fee in an amount to be fixed by the board of pharmacy, not exceeding two dollars. The first act gave one half of the penalty recovered to such board, and the other half "to the school fund of the county in which the suit was prosecuted and judgment obtained": Laws of 1882, sec. 15, c. 167. But the second act, under which the case at bar is prosecuted, provides that "all penalties collected under the provisions of this act shall inure to the school fund of the state." The question, therefore, as to the validity of

the act by reason of any diversion of the penalties from the school fund does not arise.

The first objection of the learned counsel for the defendant is, that the acts require all druggists in the state to register, regardless of their competency or experience in the business, and subjects each to an annual license fee of two dollars. The real purpose of the law seems to be to prevent any drugs, medicines, or poisons from being put up and sold in such store or shop, except by or under the supervision of a person of the requisite qualifications, to be ascertained in the manner prescribed. Was it not within the power of the legislature to thus protect the health and lives of citizens throughout the state from improper, dangerous, and destructive compounds, put up by incompetent or inefficient persons? All courts agree that the police power of the state extends to all regulations affecting the lives, limbs, health, comfort, good order, morals, peace, and safety of society, and hence may be exercised on many subjects and in numerous ways: *Baker v. State*, 54 Wis. 372; *State v. Ryan*, 70 Wis. 681. In speaking of such power, Mr. Justice Field, in a recent case, said: "The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed, by the governing authority of the country, essential to the safety, health, peace, good order, and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint, under conditions essential to the equal enjoyment of the same right by others. It is then liberty regulated by law": *Crowley v. Christensen*, 137 U. S. 89.

This principle has been applied in many ways, and to a variety of vocations. Thus it has been held that a state may require locomotive engineers therein to be examined and licensed by a board created for that purpose, and make it unlawful to operate without such license: *Smith v. Alabama*, 124 U. S. 465; *Nashville etc. R'y Co. v. Alabama*, 128 U. S. 96. So it has been held that a state may lawfully regulate the manufacture and sale of oleomargarine: *Powell v. Pennsylvania*, 127 U. S. 678, affirming *Powell v. Commonwealth*, 114 Pa. St. 265; 60 Am. Rep. 350; *Commonwealth v. Weiss*, 189 Pa. St. 247; 23 Am. St. Rep. 182; *People v. Arensberg*, 105 N. Y. 123; 59 Am. Rep. 488. So it has been held that the state may lawfully require every practitioner of medicine therein to obtain a license from a state board created therefor, as evidence of his

qualification to so practice, and make it unlawful to practice without first obtaining such license: *Dent v. West Virginia*, 129 U. S. 114; *Eastman v. State*, 109 Ind. 278; 58 Am. Rep. 400; *Williams v. People*, 121 Ill. 84. A similar rule has been applied to the practice of dentistry; *Gosnell v. State*, 52 Ark. 228; *State v. Vandersluis*, 42 Minn. 129; *State v. Creditor*, 44 Kan. 565; 21 Am. St. Rep. 306. Also to persons engaged in the business of plumbing: *Singer v. State*, 72 Md. 464.

The case at bar was, in effect, recently decided in New Hampshire, where it was held that a statute of that state which required the retailer of drugs, medicines, etc., to submit to an examination and procure a license is within the police power of the state, and is not a tax on the business, nor does it deprive of property without due process of law: *State v. Forcier*, 65 N. H. 42. In that case, as here, it was claimed that the fee required to be paid by the act rendered the same illegal, but the court said: "The fee of five dollars to be paid by the applicant for a license to engage in the business of an apothecary and druggist is merely an equivalent for the service rendered by the commissioners in making the examination and issuing the license, and cannot be considered as a tax upon the business, or as depriving the applicant of his property without due process of law": *State v. Forcier*, 65 N. H. 42. To the same effect is *Smith v. Alabama*, 124 U. S. 465; *Nashville etc. R'y Co. v. Alabama*, 128 U. S. 96.

The cases cited, especially those from the supreme court of the United States, overrule the defendant's objection, to the effect that he has been deprived of his property without due process of law, or denied the equal protection of the law, within the meaning of section 1 of the fourteenth amendment to the constitution of the United States. Due process of law, within the meaning of that section, is secured when the law operates on all alike, and no one is subjected to partial or arbitrary exercise of the powers of government: *Calwell v. Texas*, 137 U. S. 692.

So it is manifest from the authorities cited that the act in question is not open to the objection made by counsel, to the effect that it delegates legislative power to the board thereby created. The vesting of such and similar powers in boards created for the purpose has been quite common in the administration of the law, and is manifestly a legitimate exercise of legislative power. In addition to cases cited, see *Train v. Boston Disinfecting Co.*, 144 Mass. 523; *Trageser v. Gray*, 73 Md.

250; 25 Am. St. Rep. 587. To perform well the duties of a pharmacist requires special education and skill. The persons engaged in such service have intrusted to them the health and lives of the people, and hence they take upon themselves grave responsibilities. It is certainly within the province of the legislature to protect the public against the imposition of incompetency and inefficiency in such matters.

By the COURT. The judgment of the circuit court is affirmed.

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**CONSTITUTIONAL LAW — POLICE POWER — DEFINITION.** — The police power of the state is the power vested in the legislature to enact such wholesome and reasonable laws, not in conflict with the state or federal constitution, as may be conducive to the public good: *State v. Moore*, 104 N. O. 714; 17 Am. St. Rep. 696, and note; *People v. Wagner*, 86 Mich. 594; 24 Am. St. Rep. 141, and note.

**CONSTITUTIONAL LAW — PHARMACY.** — As to the constitutionality of statutes regulating the practice of pharmacy, see *People v. Moorman*, 86 Mich. 433; *State v. Donaldson*, 41 Minn. 74.

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## **BANNON v. C. AULTMAN & Co.**

[80 WISCONSIN, 307.]

**CONTRACT, ALTERING WRITTEN, BY PAROL.** — Parol evidence is admissible to prove that a written contract has been added to, changed, or superseded by an oral agreement. Therefore, though a thrashing machine was sold by a contract in writing, providing that if within five days from its first use it should fail to fulfill the guaranty given with it, notice should be given to the vendor or his agent, stating the respects in which it had failed, and that the defective parts should be returned to the place where received, the vendee may prove that after he had received the machine and become satisfied it would not fulfill the warranty, he notified the agent of the vendor, and offered to return it, and the latter thereupon solicited him to keep the machine a longer time than the contract allowed, and agreed that if all defects were not remedied it might be returned to the vendor.

**PRINCIPAL AND AGENT.** — AN AGENT HAVING POWER TO SELL thrashing machines for his principal within a designated territory is presumed to have authority, when the vendee refuses to accept a machine because of defects in its work, to agree that it may be retained on trial a longer time than specified in the written contract of sale, and that it should be fixed up and made to work satisfactorily.

**CONTRACT SPECIFYING THAT ALL CONTRACTS MUST BE IN WRITING.** — Notwithstanding a clause printed after a vendee's signature to a written contract of sale, stating that "no verbal agreement of any kind appertaining to this order will be recognized, and that all agreements must be in writing," the agent of a vendor, having power to make the original



sale, and power to make a new contract in writing, is authorized to enter by parol into a new agreement extending or modifying the terms of the original agreement.

**ACTION** to recover the consideration paid by plaintiff for a thrashing machine, on the ground that it did not fulfill the warranty under which it was sold. Verdict and judgment for the plaintiff.

*Morris and Morris, and Burr W. Jones, for the appellant.*

*F. J. and C. F. Lamb, and John M. Olin, for the respondent.*

**COLE, C. J.** In this case the plaintiff seeks to recover the consideration which he has paid for a thrasher which the defendant company sold him, with an express warranty that with proper use and management the machine would do as good work as any other of its size made in the United States. The plaintiff claims to have fairly tested the machine, and found it defective and not fulfilling the warranty, so he returned it to the place and person where it was received. He gave two negotiable promissory notes for the purchase-money, one of which he has paid, and the other has been negotiated, so that he is liable to pay it to the holder and owner. He sues for the full consideration paid and agreed to be paid, and his right to recover that amount cannot, under the circumstances, be disputed, unless he has lost the right by failing to do something which the contract required him to do. The ingenious counsel for the defendant has assigned twenty errors to the rulings of the court below, and which he relies on for a reversal of the judgment; but it will not be necessary to notice them in detail. Our view of the main question involved will practically dispose of the case.

The defendant admits in its answer that the machine was sold by E. L. Phelps, its agent, to the plaintiff, at Madison, and that Phelps had authority to make such sale, having the charge of the machine, and the right to offer it for sale and to sell it. The plaintiff signed a printed order or contract for the machine, which contains the conditions of the sale as first made. The material clause of this contract provides that if, inside of five days from the day of the first use, the machinery shall fail to fulfill the warranty, written notice shall be given the defendant company, and also the local agent from whom the same was purchased, stating wherein it failed to fulfill the warranty, and a reasonable time allowed them to get to the machine and remedy the defect. If the machinery could not be



made to fill the warranty, the defective part was to be returned to the place where received, and another furnished which would perform the work, or the money and the notes given for the purchase price returned.

The machine was delivered to the plaintiff about the 26th of July, 1888, and was set up for use on the 6th of August. On the first day's trial the machine proved defective in many important respects. The agent, Phelps, was present in the afternoon of the day, and was informed of the defects, and what parts had broken. He looked the machine over, said it was properly set up, and suggested some changes. But the machine did not work well when these changes were made, and it never, in fact, was changed or repaired so as to do good work as a thrasher. This the testimony most clearly and conclusively proves. At the day of the trial of the machine the plaintiff had not accepted it, except conditionally, and had not given his notes for the purchase-money. When urged to settle and give his notes according to the contract, he positively refused to do so, told the agent he was not satisfied with the machine, that it did not do good work, offered to take it back to the place where he received it, or told the agent he surrendered it to him where it was, and that he was through with it. The agent then said to the plaintiff that he would give a longer time to try the machine than the contract allowed,—that he would give all the time the plaintiff wanted for the purpose,—and that the defects would be remedied and the machine made to work satisfactorily, or if not, the machine might be returned, and the notes and money would be given to the plaintiff.

This is the plaintiff's version of the new contract which was then made. It is obvious that it changed materially, or rather superseded, the terms of the written contract, and all the testimony tending to prove it was received by the court, against the objection of the defendant. Was the testimony admissible? It is insisted that it was not,—1. Because it tended to change the terms of the written contract; and 2. Because the agent had no authority to make this change in the terms of the sale.

The rule which excludes parol testimony to contradict or vary the terms of a written instrument has no application, where the object of such testimony is to show a new, subsequent agreement, involving the same subject-matter. It is often shown that the old agreement has been abandoned, or

that time and place of performance have been changed by subsequent parol contract. This is elementary law. Contemporaneous oral agreements are excluded, because the writing is presumed to contain the final contract of the parties; but it is competent to prove a new and distinct agreement upon a new consideration, whether it be a substitute for the old, or in addition to and beyond it: 1 Greenl. Ev., sec. 303. Such was the effect of the oral testimony in this case. It tended to show that the written contract as to the time of the trial of the machine had been abandoned, and a new agreement substituted.

The home office was duly notified that the machine did not work well and was defective, and of course the local agent had all the knowledge it was possible to give on the subject, as he was on the ground when it was tested.

Had the agent authority to make this modification of the written contract, and bind the defendant? We think he had. He was intrusted with the machine, to sell on such terms as might be agreed upon. He was not an agent to make this sale alone, but sales generally, in a given territory, and it must be presumed that he had the power to sell the machine in question. This must be presumed from the nature of the case. It appears that the plaintiff had refused to receive and accept the machine under the written contract. The agent then agreed, if he would retain it and pay for it, he might have a reasonable time to test it, fix it up, and make it work satisfactorily; and upon this agreement we must assume the machine was accepted and the notes given. If this new agreement had been reduced to writing, there would be no question as to its binding force on the defendant. There is a clause below the plaintiff's signature, by way of notice, to the effect that "no verbal agreement of any kind appertaining to the order will be recognized, and that all agreements must be in writing." If the agent had power to bind the defendant in writing to a new agreement, we see no good reason for holding that he could not bind it by a parol contract. Beyond all controversy, the agent was authorized to sell this and other machines for the defendant, and this necessarily implied authority to agree to what he did. It is true, some of the officers of the defendant testified that Phelps had no authority to give any warranty other or different from the printed warranty, nor to vary the terms of the sale, or extend the time for the trial of the ma-

chine. Now, it is apparent that these witnesses testified rather to a question of law than an existing fact. They could not, however, do away with the fact that Phelps was authorized to sell the machine, and this carried with it the implied power to make the sale on the terms he did.

The jury found that Phelps refused to receive the machine when it was tendered to him on the first day of its trial, and induced the plaintiff to retain it on his promise to remedy the defects, and that he would make the machine fulfill the warranty. It would be a fraud on the plaintiff to compel him, under the circumstances, to keep the thrasher. The evidence shows that it is a worthless machine, or nearly so, and that the plaintiff used every reasonable means to make it a good one. The defendant's agents surely were given ample opportunity to set up the machine, to remedy all defects, so that it would work satisfactorily to the purchaser, and do good work, but they utterly failed to make it answer the warranty.

On the trial, the plaintiff offered in evidence an affidavit of the defendant's attorney used on the motion for a continuance, in which it was stated that Phelps was the agent of the defendant, and conducted the transactions out of which the action arose. This was objected to. The answer, as we have said, admitted that Phelps was the agent of the defendant for the purpose of making sale of the machine; that he had charge of it, offered it for sale, and sold it. The statement in the affidavit showed no more than these facts, and its admission was certainly harmless in that view. This disposes of all the material questions in the case.

By the COURT. The judgment of the circuit court is affirmed.

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**CONTRACTS — WRITTEN — PAROL EVIDENCE TO SHOW ALTERATION BY VERBAL AGREEMENT.** — Parol evidence is admissible to show that at the time of the execution of a written contract, a parol agreement was entered into by the parties and made a part of it: *Redfield v. Gleason*, 61 Vt. 220; 15 Am. St. Rep. 889, and note. A written agreement may be modified, explained, or reformed by parol evidence of an oral undertaking entered into by the parties at the time of its execution: *Oake v. Pottsville Bank*, 116 Pa. St. 264; 2 Am. St. Rep. 600, and note; extended note to *Sullivan v. Lear*, 11 Am. St. Rep. 393; *Halsey v. Darling*, 13 Col. 1. Parol evidence may not be introduced to impeach the contents of a writing, but it may be admitted to show the circumstances under which it was executed: *Kentucky etc. B. Co. v. Hall*, 125 Ind. 221.

**AGENCY.** — A general agent may bind his principals by an act contrary to his

special instructions, when such act is within the scope of his authority: *Ruggles v. American etc. Ins. Co.*, 114 N. Y. 415; 11 Am. St. Rep. 674, and note. The authority of a general agent to bind his principal by contract is limited to the usual and ordinary means of accomplishing the business intrusted to him: *Williams v. Getty*, 31 Pa. St. 461; 72 Am. Dec. 757, and note.

## STREET v. JOHNSON.

[80 WISCONSIN, 455.]

**LIBEL, WHAT IS.** — An article is libelous *per se* which, being published in a newspaper, of certain persons, including the plaintiff, charges that with contracted fanaticism, alleged ladies have perambulated the streets to prevent such newspaper from being purchased, that these ladies brazenly lowered themselves to a level which they would blush; if they possessed modesty, to see described in type; that the time used by them could be more profitably employed in scrubbing their filthy kitchens; that women like them have little Christianity except that which they flaunt on dress parade; and that they are usually indifferently good mothers, wives, and daughters, and are intermeddlers, who accomplish nothing, and neglect the duties God has created for them.

**LIBEL. — A MERE SELLER OF NEWSPAPERS** is not liable though they contain a libel, if he did not know that fact, and his ignorance was not due to negligence on his part, and he had no ground to suppose that the paper was likely to contain libelous matter.

**LIBEL. — SELLER OF A NEWSPAPER CONTAINING A LIBEL** must assume the burden of proving that he did not know that it contained libelous matter.

**LIBEL — PLEADING — KNOWLEDGE OF LIBEL.** — In a complaint against a vendor of a newspaper containing a libel, it is sufficient to state that he willfully and intentionally sold and delivered the paper, without adding that he knew that it contained the libelous article.

**ACTION for libel.** The complaint charged that the defendant was the owner and keeper of a news-stand, and that he willfully and intentionally sold and delivered a large number of copies of a newspaper containing a false, defamatory, and scandalous article of and concerning plaintiff, the substance of which is shown by the first clause of the *syllabus*. The defendant demurred to the complaint, and upon the overruling of his demurrer appealed.

*Thorson and Skinvik, and Knowles, Dickinson, Buchanan, Graham, and Wilson,* for the appellant.

*Ross, Dwyer, and Smith,* for the respondent.

**CASSODAY, J.** Within the rules of law frequently announced by this court, we must hold that the article in question was libelous *per se*: *Bradley v. Cramer*, 59 Wis. 309; 48 Am. Rep.

511, and cases there cited; *Gauvreau v. Superior Pub. Co.*, 62 Wis. 409; *Moley v. Barager*, 77 Wis. 43. The principles upon which such rules are based, and the reasons for the same, need not be here repeated. The question presented is one of pleading. Upon this demurrer the allegations of the complaint must be taken as true: *Gauvreau v. Superior Pub. Co.*, 62 Wis. 407. This being so, we must assume, for the purpose of this appeal, that the article was published of and concerning the plaintiff; that it was false; and that the defendant willfully and intentionally sold and delivered the paper containing the article as therein alleged.

The learned counsel for the defendant contends, with much ingenuity, that the defendant can only be held liable in case he so sold and delivered the paper knowing that it contained the article in question; and hence, that the complaint is defective in not alleging that he knew the paper contained such article at the time of making such sale and delivery. The authorities are to the effect that the mere seller of newspapers is not liable for selling and delivering a newspaper containing a libel upon the plaintiff if he can prove upon the trial to the satisfaction of the jury that he did not know that the paper contained a libel, that his ignorance was not due to any negligence on his part, and that he did not know, and had no ground for supposing, that the paper was likely to contain libelous matter: *Emmens v. Pottle*, 16 Q. B. Div. 354; *Regina v. Judd*, 37 Week. Rep. 143; *Chubb v. Flannagan*, 6 Car. & P. 431; *Smith v. Ashley*, 11 Met. 367; 45 Am. Dec. 216. But it seems to be equally well settled that such sale and delivery of a newspaper containing a libel is *prima facie* the publication of such libel, and hence makes such vendor *prima facie* liable therefor. Thus in *Emmens v. Pottle*, 16 Q. B. Div. 354, Lord Esher, M. R., speaking for the court, said: "I agree that the defendants are *prima facie* liable. They have handed to other people a newspaper in which there is a libel on the plaintiff. I am inclined to think that this called upon the defendants to show some circumstances which absolved them from liability, not by way of privilege, but facts which show that they did not publish the libel." To the same effect is *King v. Amphlit*, 4 Barn. & C. 35. It is stated as elementary law that "every sale and delivery of a written or printed copy of a libel is a fresh publication; and every person who sells or gives away a written or printed copy of a libel may be made a defendant, unless, indeed, he can satisfy the jury that he was ignorant of

the contents. The *onus* of proving this lies on the defendant": Odgers on Slander and Libel, 160.

Since, under the authorities cited, proof of sale and delivery of the paper containing the article in question would be *prima facie* evidence of the willful and malicious publication of the libel, the allegation to the effect that the defendant willfully and intentionally sold and delivered the paper containing the article would be an allegation of the only fact the plaintiff would be required to prove in order to make out a *prima facie* case. This being so, such allegation would seem to be sufficient, without going further, and alleging that the defendant knew that the paper contained the libel; otherwise the plaintiff would be required to allege what he would not be required to prove. Besides, the question whether the defendant knew that the paper contained the article was a fact within his own knowledge, and hence his want of such knowledge is peculiarly a matter of defense.

By the COURT. The order of the circuit court is affirmed.

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**LIBEL — LIABILITY OF VENDOR OF NEWSPAPER FOR:** See note to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 336.

**LIBEL BY NEWSPAPERS.** — For an extensive discussion of this subject, see note to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 333-369.

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## **ELLIS v. NORTHERN PACIFIC RAILROAD COMPANY.**

[80 WISCONSIN, 459.]

**JUDGMENT — ESTOPPEL.** — A DECISION UPON DEMURRER is conclusive upon the questions legitimately involved; and where it is made in this court, it cannot be reviewed except by motion for a rehearing. Therefore, if, after such decision, the cause comes up for further hearing in the trial court, permission will not be granted to plead as an estoppel a judgment rendered in one of the national courts determining the same question in an opposite way to the decision of this court upon the demurrer.

**ACTION** to quiet title to real estate. Judgment for plaintiff.

*Catlin and Butler, and Pinney and Sanborn*, for the appellant.

*W. F. Bailey, D. E. Roberts, and Burr W. Jones*, for the respondent.

**WINSLOW, J.** This action, brought to quiet title, has been

once before this court upon demurrer to the complaint: 77 Wis. 114.

As will be seen by consulting the opinion upon that appeal, the complaint charged that the title claimed by appellant railroad company was derived by virtue of an attempted donation by Douglas County in consideration of the building and equipment of a certain line of railroad. This court then held, following *Whiting v. Sheboygan etc. R. R. Co.*, 25 Wis. 167, 8 Am. Rep. 30, that the county had no authority to make such a donation, and consequently that the title thereby acquired was void. It seems that a large number of parcels of land not in controversy in this action were conveyed by the county to the railroad company at the same time and by virtue of the same agreement of donation, and that subsequently to the commencement of this action, the appellant commenced an action in the United States circuit court against the respondent here for the purpose of quieting its title to said other parcels of land. In the last-named action, the adjudication of this court upon the demurrer on this action was not pleaded, and the cause proceeded to trial upon bill and answer, and resulted in a judgment, March 7, 1891, adjudging that the railroad company had good title as against the respondent to the lands involved in said action.

Immediately after the trial of said action in the United States circuit court, the appellant made application to file an amended answer in this action, setting up as a defense the judgment so rendered as a bar by way of estoppel to this action, upon the ground that the question of the validity of the agreement and conveyance of donation had been adjudged in favor of the railroad company by a competent court, in an action between the same parties. This application was refused by the circuit court, and the cause proceeded to trial April 1, 1891, upon the complaint and answer of the appellant claiming title. Upon this trial, the appellant renewed its application to plead the former adjudication, and offered in evidence the record of the action in the United States court, both of which offers were rejected and overruled by the court; and it appearing that appellant's only title was under the agreement of donation, the circuit court found and adjudged that respondent was the owner of the lands here in controversy, and that appellant's alleged title was void.

The circuit court held, in its rulings upon the proposed answer and in its judgment, in effect, that the decision of



this court upon the former appeal was *res adjudicata* in this action. If this view was correct, then the judgment below must be sustained, because upon that appeal the question was fairly raised whether the county could lawfully donate the land in question to the railroad company, and it was decided by this court that it could not.

It is vigorously contended by appellant's counsel that the rule of law is, that a decision can only become *res adjudicata* when it is contained in a final judgment in the cause, and that the decision upon the demurrer being confessedly not a final judgment, but granting leave to plead over, it cannot be considered as *res adjudicata*; and authorities are cited which undoubtedly tend to support that contention.

We shall not attempt to review the authorities nor reconcile conflicting decisions. It is sufficient to say that by repeated decisions it has become the settled law in this state that the decision of this court upon a demurrer is conclusive upon the questions legitimately involved, and is *res adjudicata* in that case: *Noonan v. Orton*, 27 Wis. 300; *Lathrop v. Knapp*, 37 Wis. 307; *Fire Dept. v. Tuttle*, 50 Wis. 552. It is true that this court has decided that an order of the circuit court upon a demurrer is not *res adjudicata*. This doctrine, however, is based upon the ground that such an order is reviewable by statute upon appeal from the judgment: *Hackett v. Carter*, 38 Wis. 394. But the decision of this court upon a demurrer upon the questions properly involved cannot be reviewed by the circuit court, nor, indeed, by this court, save upon motion for rehearing. Such questions are finally decided and settled for that case, and as between the parties to that litigation, for all time. This view of the law decides this case. The complaint charged the appellant's alleged title to be just what the proofs now before us show it to be, and this court, prior to the judgment in the United States court, finally decided that such alleged title was worthless. The question was no longer an open one, and the circuit court was right in ruling out the record of the action in the United States court, and rendering judgment for the plaintiff.

The conflict between the opinions of this court and the United States courts upon the question of donations by municipal corporations to railway companies is to be regretted, but we cannot change what we believe to be a salutary and wholesome rule of law, which has become settled by frequent decisions of this court, on that account. These views render



unnecessary any discussion of other questions argued by counsel.

By the COURT. The judgment of the circuit court is affirmed.

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**JUDGMENT ON DEMURRER — CONCLUSIVENESS OF.** — A judgment rendered upon demurrer which goes to the merits of the action is final and conclusive: *McLaughlin v. Doane*, 40 Kan. 392; 10 Am. St. Rep. 210, and note; *Coffin v. Kest*, 2 G. Greene, 582; 52 Am. Dec. 537, and note.

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## VOSBURG v. PUTNEY.

[80 WISCONSIN, 522.]

**ASSAULT WITHOUT INTENT TO HARM.** — In an action for an assault committed upon plaintiff, it is not necessary to show an intent to do him harm. Hence, if one child kicks another in a school, after it has been called to order, the latter may recover for the resulting injuries, though there was no intent to harm him.

**EVIDENCE — EXPERTS.** — A HYPOTHETICAL QUESTION TO AN EXPERT, WHICH EXCLUDES from his consideration facts already proved, should not be permitted, when the excluded facts are necessary to enable him to form an intelligent opinion.

**DAMAGES RECOVERABLE FOR A TORT** include all injuries resulting from the wrongful act, whether they could have been foreseen by the wrong-doer or not. Therefore, in an action to recover for injuries resulting to plaintiff from being kicked by defendant, though there was evidence to show that there was no intention of doing any harm, and that the injury suffered by plaintiff was aggravated by his having received a previous injury, it was held proper to refuse an instruction that only such damages could be recovered as defendant might reasonably be supposed to have contemplated as likely to have resulted from his kicking plaintiff.

**ACTION** to recover damages for assault and battery. Plaintiff, aged fourteen years, and defendant, aged twelve years, were fellow-pupils in the same school, and while in the school-room, the latter kicked the former, causing the injury complained of. The jury returned the following special verdict: "1. Had the plaintiff, during the month of January, 1889, received an injury just above the knee, which became inflamed, and produced pus? A. Yes. 2. Had such injury, on the twentieth day of February, 1889, nearly healed at the point of injury? A. Yes. 3. Was the plaintiff, before said 20th of February, lame, as the result of such injury? A. No. 4. Had the tibia in the plaintiff's right leg become inflamed or diseased to some extent before he received the blow or kick from the defendant? A. No. 5. What was the exciting cause

of the injury to the plaintiff's leg? A. Kick. 6. Did the defendant, in touching the plaintiff with his foot, intend to do him any harm. A. No. 7. At what sum do you assess the damages of the plaintiff? A. \$2,500." Upon this verdict, the court entered judgment in favor of plaintiff, from which the defendant appealed.

*T. W. Haight, and J. V. Quarles, for the appellant.*

*Ryan and Merton, for the respondent.*

LYON, J. Several errors are assigned, only three of which will be considered.

1. The jury having found that the defendant, in touching the plaintiff with his foot, did not intend to do him any harm, counsel for defendant maintain that the plaintiff has no cause of action, and that defendant's motion for judgment on the special verdict should have been granted. In support of this proposition, counsel quote from 2 Greenl. Ev., sec. 83, the rule that "the intention to do harm is of the essence of an assault." Such is the rule, no doubt, in actions or prosecutions for mere assaults. But this is an action to recover damages for an alleged assault and battery. In such case the rule is correctly stated, in many of the authorities cited by counsel, that plaintiff must show either that the intention was unlawful, or that the defendant is in fault. If the intended act is unlawful, the intention to commit it must necessarily be unlawful. Hence, as applied to this case, if the kicking of the plaintiff by the defendant was an unlawful act, the intention of defendant to kick him was also unlawful.

Had the parties been upon the play-grounds of the school, engaged in the usual boyish sports, the defendant being free from malice, wantonness, or negligence, and intending no harm to plaintiff in what he did, we should hesitate to hold the act of the defendant unlawful, or that he could be held liable in this action. Some consideration is due to the implied license of the play-grounds. But it appears that the injury was inflicted in the school, after it had been called to order by the teacher, and after the regular exercises of the school had commenced. Under these circumstances, no implied license to do the act complained of existed, and such act was a violation of the order and decorum of the school, and necessarily unlawful. Hence we are of the opinion that, under the evidence and verdict, the action may be sustained.

2. The plaintiff testified, as a witness in his own behalf, as

to the circumstances of the alleged injury inflicted upon him by the defendant, and also in regard to the wound he received in January, near the same knee, mentioned in the special verdict. The defendant claimed that such wound was the proximate cause of the injury to plaintiff's leg, in that it produced a diseased condition of the bone, which disease was in active progress when he received the kick, and that such kick did nothing more than to change the location, and perhaps somewhat hasten the progress of the disease. The testimony of Dr. Bacon, a witness for plaintiff (who was plaintiff's attending physician), elicited on cross-examination, tends to some extent to establish such claim. Dr. Bacon first saw the injured leg on February 25th, and Dr. Philler, also one of the plaintiff's witnesses, first saw it March 8th. Dr. Philler was called as a witness after the examination of the plaintiff and Dr. Bacon. On his direct examination he testified as follows: "I heard the testimony of Andrew Vosburg in regard to how he received the kick, February 20th, from his playmate. I heard read the testimony of Miss More, and heard where he said he received this kick on that day." (Miss More had already testified that she was the teacher of the school, and saw defendant standing in the aisle by his seat, and kicking across the aisle, hitting the plaintiff.) The following question was then propounded to Dr. Philler: "After hearing that testimony, and what you know of the case of the boy, seeing it on the eighth day of March, what, in your opinion, was the exciting cause that produced the inflammation that you saw in that boy's leg on that day?" An objection to this question was overruled, and the witness answered: "The exciting cause was the injury received at that day by the kick on the shin-bone."

It will be observed that the above question to Dr. Philler calls for his opinion as a medical expert, based in part upon the testimony of the plaintiff, as to what was the proximate cause of the injury to plaintiff's leg. The plaintiff testified to two wounds upon his leg, either of which might have been such proximate cause. Without taking both of these wounds into consideration, the expert could give no intelligent or reliable opinion as to which of them caused the injury complained of; yet, in the hypothetical question propounded to him, one of these probable causes was excluded from the consideration of the witness, and he was required to give his opinion upon an imperfect and insufficient hypothesis, — one

which excluded from his consideration a material fact essential to an intelligent opinion. A consideration by the witness of the wound received by the plaintiff in January being thus prevented, the witness had but one fact upon which to base his opinion, to wit, the fact that defendant kicked plaintiff on the shin-bone. Based, as it necessarily was, on that fact alone, the opinion of Dr. Philler that the kick caused the injury was inevitable, when, had the proper hypothesis been submitted to him, his opinion might have been different. The answer of Dr. Philler to the hypothetical question put to him may have had, probably did have, a controlling influence with the jury, for they found by their verdict that his opinion was correct.

Surely there can be no rule of evidence which will tolerate a hypothetical question to an expert, calling for his opinion in a matter vital to the case, which excludes from his consideration facts already proved by a witness, upon whose testimony such hypothetical question is based, when a consideration of such facts by the expert is absolutely essential to enable him to form an intelligent opinion concerning such matter. The objection to the question put to Dr. Philler should have been sustained. The error in permitting the witness to answer the question is material, and necessarily fatal to the judgment.

3. Certain questions were proposed on behalf of defendant, to be submitted to the jury, founded upon the theory that only such damages could be recovered as the defendant might reasonably be supposed to have contemplated as likely to result from his kicking the plaintiff. The court refused to submit such questions to the jury. The ruling was correct. The rule of damages in actions for torts was held in *Brown v. Chicago etc. R'y Co.*, 54 Wis. 342, 41 Am. Rep. 41, to be that the wrong-doer is liable for all injuries resulting directly from the wrongful act, whether they could or could not have been foreseen by him. The chief justice and the writer of this opinion dissented from the judgment in that case, chiefly because we were of the opinion that the complaint stated a cause of action *ex contractu*, and not *ex delicto*, and hence that a different rule of damages — the rule here contended for — was applicable. We did not question that the rule in actions for tort was correctly stated. That case rules this on the question of damages.

The remaining errors assigned are upon the rulings of the court on objections to testimony. These rulings are not very

likely to be repeated on another trial, and are not of sufficient importance to require a review of them on this appeal.

By the COURT. The judgment of the circuit court is reversed, and the cause will be remanded for a new trial.

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**ASSAULT — INTENT TO HARM — NECESSITY FOR.** — There may be an actionable assault, although there was no specific intent to do harm: *Mercer v. Curtis*, 117 Ind. 450; 10 Am. St. Rep. 76, and note. When a party, by an act which he could have avoided, and which he cannot justify, inflicts injury upon another by force, he is answerable in damages to the person injured: *Goldsmith v. Joy*, 61 Vt. 488; 15 Am. St. Rep. 923.

**DAMAGES RECOVERABLE FOR ASSAULT.** — In an action for assault, damages cannot be recovered by way of punishment, but the plaintiff is entitled to compensation for the injury done him: *Beck v. Thompson*, 31 W. Va. 459; 13 Am. St. Rep. 870, and note; note to *Goldsmith v. Joy*, 15 Am. St. Rep. 930; *Morgan v. Kendall*, 124 Ind. 455.

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## ALLEN v. WEBER.

[80 WISCONSIN, 581.]

**BOUNDARY, WHEN LIMITED TO MARGIN OF THE RIVER.** — Conveyance in which lands are described as running to low-water mark on the west-erly side of F. River, and thence northerly along low-water mark on the west side of F. River, as established by a certain dam, to a town line, etc., does not include the land between low-water mark and the thread of the stream. Nor is this construction of the deed rendered inapplicable by the further fact that the grantor, being the owner of a dam, reserved the right of the flowage.

**STATUTE DECLARING A RIVER TO BE A NAVIGABLE STREAM** cannot affect rights of riparian owners or of owners of a dam acquired before the passage of such statute.

**ACTION** to enjoin the cutting of ice in a mill-pond alleged to belong to the plaintiff. This pond was a part of Fox River, and it was conceded that it at one time was the property of R. N. Kimball, who executed a conveyance to one Poorman, the descriptive words of which, so far as material, appear in the opinion of the court, and whatever title passed by this deed had become vested in the defendants. Subsequently Kimball conveyed the strip between low-water mark and the thread of the stream to plaintiff, who was in possession thereof. In the deed from Kimball, he reserved "the right to overflow said land with the water of Fox River and said mill-pond, and of keeping and maintaining a certain mill-dam at its present height, or any other height not exceeding the

height thereof as established and ascertained by a survey and measurement thereof" referred to in the deed. Judgment in favor of the plaintiff.

*T. E. Ryan and E. Merton*, for the appellants.

*C. E. Armin*, for the respondent.

ORTON, J. The respondent is the owner of that part of the northeast quarter of section 3, township 6, range 19 east, which is known as the "Saratoga Mills property," at Waukesha, and of that portion of the mill reserve and water used in connection therewith on the Fox River not heretofore conveyed to others.

The appellants are the owners of a strip of land containing about two acres on the westerly side of the mill-pond of the plaintiff, on which they have erected an ice-house for the storage of ice cut from Fox River or said mill-pond for the use of Bethesda brewery, and for other purposes. This strip is described in their deeds as follows: "Beginning at a point on the center of Union Street, where the same presumably intersects the easterly line of lot 4, in the Northwest Addition to the plat of Prairieville [now village of Waukesha]; thence running easterly on the continuation of the center line of Union Street to low-water mark on the west side of Fox River; thence running northerly along the low-water mark on the said westerly side of Fox River to the town line, where said town line presumably intersects and divides the towns of Pewaukee and Waukesha; thence running west along the said town line to the northeast corner of block X; thence southerly along the east line of said block X, and southerly along the corner of said block X (or the center of Union Street), being the place of beginning; containing two acres, be the same more or less."

The respondent brings this suit to restrain the appellants from cutting ice on said mill-pond, and for an accounting of ice already taken away from said pond. His action is predicated upon his ownership of the bed of the river or pond, and to low-water mark on the west side thereof, the east line of the appellants' land.

The appellants defend,—1. As the owners of the fee in the soil covered by the river or pond to the center thread thereof, by virtue of the above description of their strip of land on the west side of said river or pond; 2. As riparian owners of the

shore of said river or pond as a navigable stream; 3. On the ground that the purchase and ownership of the said strip of land were solely for the purpose of building ice-houses thereon, and to obtain ice from said pond.

The judgment is, that the plaintiff is the owner in fee of all that portion of the bed of Fox River embraced within the limits of mill reserve in the town of Waukesha, and was at the commencement of the action, and that the east boundary of the lands owned by the defendants upon the west side of Fox River is limited to low-water mark upon the westerly side of Fox River, and that by the conveyance they took no title in fee as riparian proprietors to any part or portion of the bed of said Fox River easterly from the line fixed in said deed as low-water mark on the west side of Fox River. It is further adjudged that the plaintiff recover of and from the defendant his damages, assessed at the sum of six cents, and his costs, etc., and that the injunction be dissolved.

The mills and mill-pond at Waukesha are so ancient that in all the later conveyances the pond is called the Fox River at that place, and the low-water mark of the river means the low-water mark of the pond. The above-stated defenses constitute the points made by the learned counsel of the appellants on this appeal from the above judgment, and they will be considered in their order.

1. The above description in the conveyances to the appellants makes their strip of land extend to the center of the pond. The description of their east line is peculiar. It is "the continuation of the center line of said Union Street to the low-water mark on the west side of Fox River; thence northerly along the low-water mark on the said westerly side of Fox River to the town line," etc. The doctrine asserted by the learned counsel, that as to lands which extend to and cover the banks of navigable streams, the presumption is, that it was the intention to convey all the rights of the grantors to the bed of the stream, to the center thereof, is undoubtedly correct. But this is a mere presumption, and may be rebutted by the strong language of the deed, clearly indicating the intention to establish the line at the margin of the stream. There could be no language of description more clearly indicating the exact line than is found in the conveyances of this strip of land: "To low-water mark; thence northerly along the low-water mark." This language could have no other meaning than to indicate the intention of the grantors to limit



the premises, and establish their boundary at that line "along low-water mark."

In principle, this case is decided in *Greene v. Nunnemacher*, 86 Wis. 50. That was a case for abatement of the nuisance created by a distillery. One part of the damages was for corrupting the waters of the Kinnickinnic River, and rendering them unfit for use by the plaintiff as a riparian proprietor on said river. The deed by which the plaintiff held his premises described his land as "running along the bank" of said river. The present chief justice said in his opinion: "For, according to the description of the premises as given in the deed, there is reason for saying that they are limited to the river bank, and do not in fact include the bed of the stream or the waters of the same." Chief Justice Ryan, then at the bar, was counsel for the appellant, and cited the following authorities to the point that the description of plaintiff's land limits the same to the bank of the creek: Angell on Watercourses, secs. 8, 26; *Cary v. Daniels*, 5 Met. 236; *Crittenton v. Alger*, 11 Met. 281; *Starr v. Child*, 20 Wend. 149; *Child v. Starr*, 4 Hill, 369; *Hatch v. Dwight*, 17 Mass. 289; 9 Am. Dec. 145; *Starr v. Child*, 5 Denio, 599. This shows that the point was well considered by the court. The language "along the bank" is not as certain and specific as the language "along low-water mark."

In the following cases, the line is limited by the description, and no part of the bed of the stream is conveyed: "Thence northeasterly up the west bank of Pine Creek": *Murphy v. Copeland*, 51 Iowa, 515; 58 Iowa, 409; 43 Am. Rep. 118, and cases cited. "To and along the bank": *Halsey v. McCormick*, 13 N. Y. 296; *People ex rel. Comm'rs v. Supervisors*, 125 Ill. 9. "As far as high-water mark" is the outer line of the overflow of a mill-pond so described in the conveyance: *Jones v. Parker*, 99 N. C. 18. "To the Genesee River; thence northwardly along the shore of said river": *Starr v. Child*, 20 Wend. 149. In *Murphy v. Copeland*, 51 Iowa, 515, it was held that "along the bank" was equivalent to "along low-water mark," and the same in *Halsey v. McCormick*, 13 N. Y. 296. In *Cook v. McClure*, 58 N. Y. 437, 17 Am. Rep. 270, the language is: "To a stake near the high-water mark of the pond, running thence along the high-water mark of said pond to," etc.,—and it was held that the line was limited at high-water mark, and would not extend even to low-water mark. This case is exactly in point. In *Bradford v. Cressey*, 45 Me. 9, the language is: "Thence east until it strikes the creek on which the mill



stands; thence southwesterly on the west bank of said creek," — and it was held that "the grantee was restricted to the bank of the creek." The line so described is a monument and fixed boundary: Angell on Watercourses, sec. 25.

From the language of the description of the defendants' strip of land itself, it is perfectly clear that low-water mark was made a fixed and permanent boundary. If the situation of the strip on the pond is consulted, that would evince the same intention. It was contiguous to a very old mill-dam belonging to the grantors, now called the Fox River at that point. It was not likely that it was intended to give the grantees of this strip any interest in the waters of the pond, or any control over the water-power or interference with it. Such a situation of the strip clearly indicates the intention to so limit the eastern line to low-water mark, and not have it extend *ad filum aquæ* of the pond. Such a reason was held to prevail in *Smith v. Ford*, 48 Wis. 115. The owners of the water-power and mill-dam are the only riparian proprietors of the land covered by the pond to low-water mark on the west, and therefore owned the ice formed on the pond: Brantley on Personal Property, sec. 98; Lawson's Rights, Remedies, and Practice, sec. 1345.

2. The declaration made by the legislature of 1868, that Fox River is a navigable stream, could not possibly affect the rights of the owners of the dam, acquired long before, or make the dam navigable, or any other part of Fox River, in any other sense than mere theory. The defendants' rights are fixed by their deeds, and that act certainly could not change them in the least.

3. The object of the purchase of the strip — to build ice-houses on it — would not imply ownership of the ice, for he could procure from the owner the right to cut ice on the pond, or buy the ice cut by others, and fill his ice-house in that way. But at best such a purpose would not affect the deed, or the natural construction of its language. Deeds would be very inconclusive if they were to be governed by the use the purchaser intended to make of the land. Such a use might require twice the quantity of the land conveyed, with a complete change of its boundaries.

4. It is contended that a reservation in the first deed of this strip of the right of flowage by the owner of the dam indicates an intention to convey to the center of the pond. By that reservation the grantor reserved the right to flow the

whole strip, and not merely the land thus covered by the pond. But there is a margin between high and low water marks the grantor reserved the right to flow, which would be entirely consistent with the grantees' line being limited to low-water mark. That reservation need not affect the construction of the deed in respect to its conveyance to the center of the pond, for it would have full and complete operation and effect over the land granted.

We can find no error in the record. The judgment is evidently correct.

By the COURT. The judgment of the circuit court is affirmed.

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**RIPARIAN RIGHTS — MILL-OWNER ON NAVIGABLE STREAM.** — In Kentucky, one who erects a mill on a watercourse acquires a vested right which cannot be infringed upon or taken away without compensation: *Anderson v. Cincinnati etc. R'y*, 86 Ky. 44; 9 Am. St. Rep. 263.

**WATERS AS BOUNDARY LINES. — Navigable and Non-navigable Streams, Distinction between.** — In text-books and in decisions, the expression is sometimes made that conveyances of land bordering upon non-navigable or non-tidal streams are presumed to extend to the thread thereof, and that conveyances of land bordering upon tidal or navigable streams are presumed to extend only to the bank or ordinary high-water mark thereof: *Fuller v. Williams*, 122 Pa. St. 191; 9 Am. St. Rep. 88. An examination of the decisions will show, however, that no such distinction exists. By the law of England, and that of many of the United States, the beds of navigable and tidal streams are presumed to be the property of the sovereign or state, and not of the adjacent landed proprietors, and conveyances of land fronting upon them, made by private owners, are presumed not to be intended to extend beyond the line of their ownership, and therefore to stop where that ownership stops, which is generally at ordinary high-water mark. When, however, it clearly appears that the bed of a navigable or tidal stream is not vested in the state or sovereign, but in some private proprietor, the presumptions ordinarily attending conveyances cease to operate, and their place is taken by a contrary presumption, which is, that the grantor did not intend to reserve to himself the flats nor the land covered by water lying between the bank and the thread of the stream, and to thus shut off his grantee from ownership in the land underlying the water. In the multitude of decisions, it would, perhaps, be extreme to say that none can be found in conflict with the rule which we have stated, but our industry has not enabled us to discover any in conflict with it. On the contrary, in every instance in which we have seen the question decided, where it appeared that the grantor owned any part of the bed of the stream, whether navigable or tidal, or not, his conveyance has been held to extend to the thread of the stream, when he owned so far, and in other cases up to the line of his ownership, when it did not extend so far into the stream as its thread, unless it contained some words clearly reserving from the operation of his deed the land so owned by him: *Morrison v. Keen*, 3 Greenl. 474; *Berry v. Snyder*, 3 Bush, 283; *Sleeper v. Laconia*, 60 N. H. 201; 49 Am. Rep. 311; *Lunt v. Holland*, 14 Mass. 150; *Williamsburgh Boom Co. v. Smith*, 84 Ky. 375, 376; *Norcross v. Griffiths*, 65 Wis. 610, 615; *Jones v.*

*Sciard*, 24 How. 65; Gould on Waters, sec. 194; *McCullough v. Wall*, 4 Rich. 68; 52 Am. Dec. 715; *Watson v. Peters*, 26 Mich. 508, 517; *Brown Oil Co. v. Caldwell*, 35 W. Va. 95; *Chandos v. Mack*, 77 Wis. 573; 20 Am. St. Rep. 139; *Browne v. Kennedy*, 5 Har. & J. 195; 9 Am. Dec. 503.

The case cited above from 65 Wisconsin well expresses the law upon the subject, and is very pertinent here, because the river under consideration was a navigable stream, and the conveyance to be interpreted did not mention the stream at all, but described certain courses and distances, which, in fact, extended along its banks; and it was contended that the deed should be limited to the precise land included in such courses and distances, and should not extend to the center of the stream. After considering the arguments made by counsel, and the decisions of the various courts, the true rule upon the subject was thus stated in the opinion of the court: "When it is made to appear that the lands conveyed by the deed extend to and cover the banks of a navigable stream, the presumption is, that the intention was to convey all the right of the grantor in the bed to the center thereof; and in order to defeat this presumption, there must be clear proof that such was not the intention of the parties to the conveyance; and the fact that in giving the boundaries of the lot conveyed no mention is made of the stream, and that the lands are described by courses and distances, does not, in itself, overcome such presumption." The same principle was thus stated by Wilson, C. J., in *Middleton v. Pritchard*, 3 Scam. 510; 38 Am. Dec. 112: "A grant of land upon a river extends the title of the grantee to the middle of the same, if the grantor has authority to extend it so far, unless limited to another boundary by express terms. This is a general principle of the common law applicable to private conveyances, which are construed most strongly against the grantor." This is in substantial accord with the rule as stated in Gould on Waters, sec. 195, in the following language: "When riparian estates are conveyed, the owner may reserve the land under water, but the general presumption is, that the purchaser's title extends as far as the grantor owns, in both tidal and fresh waters."

The remark we have made, to the effect that a conveyance of land adjacent to a stream extends so far into the stream as the grantor had title, is well illustrated by the decisions in the New England states. By the common law, as already suggested, the sovereign was the owner of all lands in tide-water streams or beneath arms of the sea below ordinary high-water mark, and for this reason grants of private property adjacent to such streams or arms were limited to such mark, because it was the line of the grantor's proprietorship. But in the colony of Massachusetts, by an ordinance passed in or about the year 1647, it was declared that the owners of land should hold title to low-water mark, provided it was within one hundred rods of high-water mark; or in other words, that the flats covered and uncovered by the ebb and flow of the sea and of tidal streams should belong to the adjacent proprietor, unless such flats were more than one hundred rods in width. As a result of this change of law, whereby the flats were vested in the adjacent proprietors, it was ever afterwards decided that in a conveyance of land bounded by or upon a sea, or bay, or harbor, or river, or stream, should extend to and include the adjacent flats, if they belonged to the grantor: Gould on Waters, sec. 195; *Mayhew v. Norton*, 17 Pick. 359; *Winslow v. Patten*, 34 Me. 25; *Lampish v. Bangor Bank*, 8 Greenl. 85, 92; *Doane v. Willcutt*, 5 Gray, 328; *Boston v. Richardson*, 105 Mass. 351, 355-357. The question is very fully considered in the case last cited, which involved the construction of a grant upon the tide-water adjacent to Boston. The town of Boston had made a grant of land, one of the boundaries of which

was "the bay," and it was insisted that this grant did not include the flats in front of the land granted, but it was conceded that if the ordinance of 1647 was in operation at the time the grant was made, or in other words, if the town of Boston had any title to the flats in front of the lot, such title was vested in its grantee. The court, after considering and citing many authorities, concluded by saying: "Applying the rules already stated to this case, the result is, that if the town of Boston, at the time of making the grant to Gridley and Baxter, held these flats, not for the general use but as its own property, those grants bounded 'with the bay' passed them to the grantees." In what appears to have been a decision of the same case upon a previous appeal (see 13 Allen, 155), the court said: "Whenever land is described as bounded by other land, or by a building or structure, the name of which, according to its legal and ordinary meaning, includes the title in the land of which it has been made a part, as a house, a mill, a wharf, or the like, the side of the land or structure referred to as a boundary is the limit of the grant; but when the boundary line is simply by an object, whether natural or artificial, the name of which is used in ordinary speech as defining a boundary, and not as describing a title in fee, and which does not in its description or nature include the earth as far down as the grantor owns, and yet which has width, as in the case of a way, a river, a ditch, a wall, a fence, a tree, or a stake and stones, then the center of the thing so running over or standing on the land is the boundary of the lot granted. A corresponding rule has been steadily and consistently applied to conveyances of land by the sea, the owner of which, by virtue of the colonial ordinance of 1647, has the title in the shore or flats within one hundred rods of high-water mark, and above low-water mark. Thus a boundary by a tide-water creek, from which the tide wholly ebbs and flows at low water, carries the flats as far as the center of the creek, unless limited by special words: *Harlow v. Fish*, 12 Oush. 304; *Chapman v. Edmands*, 3 Allen, 512. So a boundary 'on a river' within the ebb and flow of the tide, or 'on the stream' of such a river, passes the title of the grantor to the extent of his ownership, unless expressly restricted to the shore or bank: *Dunlap v. Stetson*, 4 Mason, 366; *Thomas v. Hatch*, 3 Sum. 178, 179; *Lapish v. Bangor Bank*, 8 Greenl. 85; *Moore v. Griffin*, 22 Me. 350. In short, any boundary by the tide-water, by whatever name, whether 'sea,' 'harbor,' or 'bay,' includes the land below high-water mark, as far as the grantor owns": *Boston v. Richardson*, 13 Allen, 155.

When a stream is not navigable, or when, though navigable, the grantor owns the bed of it, the rule generally prevails that all grants of land bordering upon it vest title in the grantee to the thread of the stream, unless an intent to limit it to some other line is manifested by the deed: *Jackson v. Louw*, 12 Johns. 255; *Brown v. Huger*, 21 How. 306; *Lowell v. Robinson*, 16 Me. 357; 33 Am. Dec. 671; *Williams v. Buchanan*, 1 Ired. 535; 35 Am. Dec. 760; *Cold S. P. I. W. v. Tolland*, 9 Cush. 496; *Williamsburg Boom Co. v. Smith*, 84 Ky. 372; *Berry v. Snyder*, 3 Bush, 266; *Warren v. Thomaston*, 75 Me. 329; 46 Am. Rep. 397.

*The Thread of the Stream* is not necessarily, nor ordinarily, the middle of the channel, but is a line running equidistant from its two banks at the ordinary stage of its waters: *Warren v. Thomaston*, 75 Me. 329; 46 Am. Rep. 397; *Hopkins v. Dickinson*, 9 Cush. 552; *Boscawen v. Canterbury*, 23 N. H. 188; and therefore where the channel of a river is named as a boundary, the thread of the stream is not meant, but the deepest part, "the water-road over which vessels pass and repass": *Warren v. Thomaston*, 75 Me. 329; 46 Am. Rep. 397.

**Water need not be Named as a Boundary.** — It is not necessary, to entitle a deed to have applied to it the rule of construction extending its boundary to the thread of the stream, that the fact that one of the boundaries is a stream should be stated in or appear from the deed. Hence, though property is conveyed by a description stating its metes and bounds, without mentioning any water or stream, yet if one of these boundaries extends into or along a stream, the title of the grantor to lands lying between the boundary and the center of the stream will vest in his grantee: *Norcross v. Griffiths*, 65 Wis. 599. So if lands bordering upon a navigable stream are subdivided in city lots designated by numbers, and a conveyance is made of any of such lots by such designation, the grantee acquires thereby all the title which the grantor had in the lands lying between the lot and the thread of the stream in front of it: *Watson v. Peters*, 26 Mich. 508; *Trustees v. Haven*, 11 Ill. 554; *Mariner v. Schulte*, 13 Wis. 692.

**Meander Lines.** — In surveying land adjacent to a stream, whether navigable or not, meander lines are often run from one point to another along or near the bank or margin of the stream, in such a manner as to leave a considerable quantity of land lying between the lines thus run and the thread or bank of the stream. The purpose of these lines is, however, universally considered to be that of designating the general course of the stream, and of providing means by which to make an estimate of the quantity of land included, and they have never, so far as we are aware, been permitted to have the effect of restricting the boundary line, or of preventing it from extending to the thread of the stream or to the line of the grantor's ownership as it would have done had such meanders not been made or mentioned: *Fuller v. Dauphin*, 124 Ill. 542; 7 Am. St. Rep. 388; *Minto v. De Laney*, 7 Or. 342; *Brown v. Huger*, 21 How. 320; *Chandos v. Mack*, 77 Wis. 573; 20 Am. St. Rep. 139; *Middleton v. Pritchard*, 3 Scam. 510; 38 Am. Dec. 112; *Kraut v. Crawford*, 18 Iowa, 549; 87 Am. Dec. 414; *Schurmeier v. St. Paul R. R.*, 10 Minn. 82; 88 Am. Dec. 59; *Jefferis v. East O. L. Co.*, 134 U. S. 178; *Ladd v. Osborne*, 79 Iowa, 93; *Yates v. Van de Bogert*, 56 N. Y. 526, 531; *Churchill v. Grundy*, 5 Dana, 100; *Bruce v. Taylor*, 2 J. J. Marsh. 160; *Sphung v. Moore*, 120 Ind. 352. This rule has very recently been applied to non-navigable lakes of considerable magnitude, and patents to lands adjacent thereto have been interpreted as vesting title in the patentee to the middle of the lake: *Mitchell v. Smale*, 140 U. S. 406; *Hardin v. Jordan*, 140 U. S. 371.

**Presumption is against Grantor.** — There is no doubt of the ability of a grantor of land bordering upon a stream, whether navigable or not, to limit the line of his grant so as to exclude therefrom any portion of the stream which he may choose to retain. But as ordinarily it would be of no advantage to him, and of very great disadvantage to his grantee, to have the grantor retain title to the bed of the stream in front of the lands granted, the presumption, in the absence of words necessarily excluding it, is, that the grantor intended to convey to the extent of his ownership, and therefore, that title will pass to the thread of the stream if he owned up to that line, or in the case of navigable or tidal streams, the beds of which he does not own, that his grant extends to low-water mark: *Brown Oil Co. v. Caldwell*, 35 W. Va. 95; *Holden v. Chandler*, 61 Vt. 291; *Palmer v. Farrell*, 129 Pa. St. 162.

**Monuments at Side of Stream.** — The fact that one or more of the courses designated in the deed extends to a stake, tree, or other monument on the bank or by the side of a stream, is not sufficient to indicate an intent on the part of the grantor to limit the boundaries of his grant, nor to prevent their reaching to the thread of the stream, where the boundary between the stakes

or monuments referred to is described as running with, by, along, or upon the stream: *Lowell v. Robinson*, 16 Me. 357; 33 Am. Dec. 671; *St. Louis v. Rutz*, 138 U. S. 243; *County of St. Clair v. Lovington*, 23 Wall. 46, 64; *Hess v. Cheney*, 83 Ala. 251; *Seneca Nation v. Knight*, 23 N. Y. 498; *Luce v. Carley*, 4 Wend. 451; 35 Am. Dec. 637; Gould on Waters, sec. 197.

*Lines Running along the Bank, Edge, or Margin.* — A conveyance, instead of designating the boundary adjacent to a watercourse as running along, to, with, or by the stream may describe it as running to, with, or along the bank, margin, edge, or shore, or the high or the low water mark; and then the question arises whether this description is one limiting the boundary, and in effect reserving to the grantor lands owned by him between the thread or low-water mark of the stream and the boundary named in the deed. Where the description specifies the line or boundary as running along the bank of a stream, whether navigable or not, we believe that the authorities concur in asserting that the word "bank" must be construed as limiting and restricting the boundary, and preventing it in any event from reaching the thread of the stream: *Bradford v. Cressey*, 45 Me. 9; *Rockwell v. Baldwin*, 53 Ill. 19. The word "bank" does not limit the boundary line to the top or even to the bottom of the small bluff or precipice usually adjacent to streams, but is regarded rather as equivalent to the expression "low-water mark," and therefore as entitling the grantee to lands extending up to the water at all stages; for his grant will not be construed as cutting him off from access to the waters bordering upon the lands granted to him: *Halsey v. McCormick*, 13 N. Y. 296; *Yates v. Van de Bogert*, 56 N. Y. 526; *Lamb v. Ricketts*, 11 Ohio, 311; *Murphy v. Copeland*, 58 Iowa, 409; 43 Am. Rep. 118. In one case it was decided that though the grant described lands as bounded by or on the margin of a river, they nevertheless extended, by a construction of law, to the center of the stream: *Ex parte Jennings*, 6 Cow. 518; 16 Am. Dec. 447. Doubtless this case cannot meet with universal concurrence, and perhaps the weight of the authorities is to the effect that a boundary designated as running along, by, or with the edge or margin of a stream extends to low-water mark only: *Kanouse v. Stockbrower*, 48 N. J. Eq. 42; *Eddy v. St. Mars*, 53 Vt. 462; *Holden v. Chandler*, 61 Vt. 291. When a line is described as running to the waters of a stream, the word "waters" is regarded as synonymous with low-water mark: *Babson v. Tainter*, 79 Me. 368; and when a boundary is described as beginning at the mouth of a tide-water stream, this means the mouth as it exists at low-water: *Ball v. Slack*, 2 Whart. 508; 30 Am. Dec. 278.

*Lines Running along the Shore.* — The greatest diversity of opinion has developed in the interpretation of the word "shore" when used in a conveyance of real property. It is strictly applicable to tidal streams only, and signifies that portion of the land covered and uncovered by the ebb and flow of the ordinary tides. When the boundary is described as running to a stream, or to the shore of a stream, and thence by, with, or along the shore, some of the authorities locate such boundary at the thread of the stream: *Starr v. Child*, 20 Wend. 149; *Sleeper v. Laconia*, 60 N. H. 201; 49 Am. Rep. 311; others, at the inner side of the shore, or low-water mark: *Child v. Starr*, 4 Hill, 369, 376; *Stevens v. King*, 76 Me. 197; 49 Am. Rep. 609; while still others, when the expression is "to the shore, thence by, with, or on the shore," exclude the whole shore from the lands conveyed: *Storer v. Freeman*, 6 Mass. 435; 4 Am. Dec. 155. In a conveyance of a lot in a village of New York, two of the boundaries were described as follows: "Thence parallel with Buffalo Street about forty-five feet to the Genesee River; thence north-



esterly along the shore of said river to Buffalo Street." In construing this deed in the supreme court, Mr. Justice Cowen said: "The south line runs about forty-two feet to the Genesee River, thence northwardly along the shore of the said river to Buffalo Street; and it is insisted by the counsel for the defendants, that these latter words are so strong as to subvert the plain meaning of the former words, 'to the river,' and tie up the grant to the shore. But suppose we were to expunge the words 'to the river,' and take the 'shore' as the boundary; the grantees became proprietors of the shore, which, when applied to a fresh-water river, means the 'bank'; Johnson's Dict., quarto. 'Shore' and 'bank' signifies the earth arising on each side of the water: Johnson's Dict., tit. Bank. And then, says Sir John Leach, V. C. (*Wright v. Howard*, 1 Sim. & St. 203): '*Prima facie*, the proprietor of each bank of a stream is the proprietor of half the land covered by the stream.' The 'bank' and the 'water' are correlative. You cannot own one without touching the other. But the 'bank' is the principal object; and when the law once fixes the proprietorship of that, the soil of the river follows as an incident, or rather, as a part of the subject-matter, *usque filum aquæ*. Lord Hale puts it that fresh rivers do, of common right, belong to the owners of the soil adjacent: *De Jure Maria*, c. 1; 6 Cow. 537. The law does not stop to criticise the words by which a man is made owner; it inquires, Is he the shore-owner? If that be so, he touches the water: Per Marshall, C. J., in *Handley's Lessee v. Anthony*, 5 Wheat. 384. It is conceded that the words 'to and along the river' would include the stream. What difference, I ask, between that and 'to and along the shore'? A difference of words, signifying the same thing. In either case, taken literally, and according to common understanding, they carry you to a line intermediate the water and the land, and touching both. How do they take more? Upon construction of law, which does not require express words for the grant of every part, as houses, fences, mines, or the elements of water or air, which all pass by the word 'land'; and as a grant of land by certain boundaries *prima facie* passes all such parts to the grantee, *usque ad cælum et ad infernos*, so, within the same principle, it passes the adjoining fresh-water stream, *usque ad filum aquæ*. The passing of the one kind may just as well be questioned as another, not only in the eye of the law, but of common sense and reason. Within the first maxim, it is said one shall not build so as to overhang another's premises, darken his lights, or confine the air; and surely it would be more absurd for the law to give a man the shore or side of a fresh-water river, and yet, by saving the bed to the grantor, make the owner of the land a trespasser every time he should slake his thirst or wash his hands in the stream. In *Gasit's Administrators v. Chambers*, 3 Ohio, 495, a case by which the supreme court of the state of Ohio adopted the doctrines of Lord Hale, they say: 'A river consists of water, bed, and banks.' By running up or down, or along either, therefore, you touch the river within this case. I have said that 'along the shore' is the same thing. I admit it is not critically correct to say the 'shore' of a river. The term belongs in its strict sense to the ocean. Dr. Johnson says it applies to a river only in a secondary, or, as he calls it, a 'licentious,' sense. 'Beside the fruitful shore of muddy Nile': Johnson's Dict., tit. Shore. Yet it is sometimes so applied in legal proceedings. The compact between Virginia and Kentucky speaks of the shores of the Ohio; which word 'shores' was treated by Marshall, C. J., in *Handley's Lessee v. Anthony*, 5 Wheat. 384, as the same with 'side' or 'bank.' We know it means the same in common understanding among us, which must govern in the construction of a conveyance." From this opinion Mr. Justice Bronson dis-

sented: *Starr v. Child*, 20 Wend. 149. The case was taken to the court of errors, where the decision of the supreme court was reversed, and the views of Judge Bronson adopted by a vote of eleven to ten, but those voting for a reversal appear to have concurred in the conclusion that the word "shore," as used in the conveyance under consideration, extended the boundary to low-water mark: *Child v. Starr*, 4 Hill, 369, 376. A conveyance whose descriptive terms were substantially identical with those interpreted by the New York court was considered by the supreme court of New Hampshire, and a conclusion reached in harmony with that of Judge Cowen hereinbefore quoted: *Sleeper v. Laconia*, 60 N. H. 201; 49 Am. Rep. 311. The court referred to cases construing similar expressions employed in describing lines as running along, with, or by the sides of streets or highways, and determining that "the expressions 'on a highway' and 'by the side of a highway' were identical in meaning and effect." There is no doubt that the interpretation given to conveyances running by the sides of streets or highways, referred to by the supreme court of New Hampshire, is the one sustained by the weight of authority: *Moody v. Palmer*, 50 Cal. 31; *Paul v. Carver*, 26 Pa. St. 223; *Buck v. Squiers*, 22 Vt. 493; *Woodman v. Spencer*, 54 N. H. 507; *Salter v. Jones*, 39 N. J. L. 469; 23 Am. Rep. 229; *Kneeland v. Van Valkenburgh*, 46 Wis. 434; 32 Am. Rep. 719; *Low v. Tibbitts*, 72 Me. 92; 39 Am. Rep. 303.

In Massachusetts (*Storer v. Freeman*, 6 Mass. 435; 4 Am. Dec. 155), and perhaps in Maine (*Stevens v. King*, 76 Me. 197; 49 Am. Rep. 609), a conveyance running to the shore of a stream, and thence with, along, or by the shore, is interpreted as reserving to the grantor the whole shore; in other words, as running along that side of the shore which is farthest from the water. This interpretation yields to any expression in the deed, and perhaps in other deeds by the same grantor, showing that by the term "shore," he meant the line or side next to the water. Thus if he mentions in his deed any visible monument as being in the line which he described as running along or by the shore, it is competent to prove by parol or other evidence that such monument was on the side of the shore known as low-water mark, and such proof being made, low-water mark will be accepted as the shore line: *Storer v. Freeman*, 6 Mass. 435; 4 Am. Dec. 155. In a conveyance, the words "shore," "beach," "seashore," and "sea" may be used so as to indicate that the grantor employed them interchangeably to designate the same line, as where the boundary is declared to run "easterly on the sea or flats," or "northeasterly by the sea or beach." In this event, the boundary is not to be run partly by the beach and partly by the sea, but extends at all points to the sea at low-water mark: *Saltonstall v. Proprietors*, 7 Cush. 195; *Doane v. Willcutt*, 5 Gray, 328. In the opinion in the case last cited, the court used the following language, which, to us, it seems difficult to reconcile with its reasoning and decision in the earlier case of *Storer v. Freeman*, 6 Mass. 435, 4 Am. Dec. 155: "The owner of the upland adjoining tide-water *prima facie* owns to low-water mark; and does so in fact, unless the presumption is rebutted by proof that the upland and flats have been severed by himself or some previous owner, by the conveyance of the one without the other, in whole or in part. When, therefore, such owner of the shore conveys by a boundary on the "sea," or "seashore," or "tide-water," or any similar expression, the law gives effect to it, and extends it to low-water mark."

Because there are two sides to a shore, the whole deed must be considered in determining which side was intended. If there is doubt upon the subject, it would seem that the application of the general rule that a conveyance is construed against the grantor must determine the question in favor of the



grantee, and entitle him to have the line run along the inner side of the shore; or in other words, the line of ordinary low water, so as to include the whole shore. But it may happen that the length of the line which is mentioned in the conveyance as extending to the shore is such as to determine which side of the shore was intended, and hence, when one of the calls of a conveyance stated that the line was to be run a designated number of feet, or thereabouts, to a point on the shore of Long Island Sound, and thence along the said shore and sound as the same bend and turn, it was held that if this call reached the shore of such sound at low-water mark, then all of the shore above such mark was necessarily included in the conveyance: *Oakes v. Delancy*, 14 N. Y. Sup. Ct. 294; 15 N. Y. Sup. Ct. 561; 133 N. Y. 227; 28 Am. St. Rep.

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## BISHOP v. MCGILLIS.

[80 WISCONSIN, 576.]

A SHERIFF LEVYING ON THE PROPERTY OF A THIRD PERSON, while acting under a writ of attachment, must be regarded as incurring a liability by the doing of an act in his official capacity and in virtue of his office.

ACTION commenced in October, 1890, against McGillis for taking and converting chattels of the plaintiff on October 24, 1884. The plaintiff pleaded the statute of limitations, alleging that his supposed liability arose out of acts done by him when acting as sheriff, and that the plaintiff's cause of action accrued more than three years before the commencement of this suit. The plaintiff demurred to the answer, and his demurrer being overruled, he appealed.

*Fairchild and Fairchild*, for the appellant.

*E. C. Eastman, and Greene and Vroman*, for the respondent.

ORTON, J. The appellant sues in replevin for a stock of goods unlawfully taken and detained by the respondent. The respondent justifies the taking by the service thereon of several writs of attachments and execution, as sheriff, in cases in favor of several plaintiffs against one Armstrong as the owner of the goods, and pleads also the three years' statute of limitations according to section 4223 of the Revised Statutes, in bar of an action. The appellant's demurrer to such answer in bar was overruled, and this appeal is from said order.

The only question, therefore, is, whether the respondent can make said statute available in bar of this action by the appellant as a stranger to the attachments and executions claiming the ownership of the goods. The learned circuit court decided correctly that said statute is applicable to such a case, and overruled the demurrer. The statute reads as follows:

"Within three years: An action against a sheriff, coroner, town clerk, or constable, upon a liability incurred by the doing of an act in his official capacity and in virtue of his office, or by the omission of an official duty, including the non-payment of money collected upon execution. But this section shall not apply to an action for an escape." Was the taking of these goods, by the respondent as sheriff, upon the attachments and executions, *in virtue of his office*? I have made these words emphatic, because the question depends solely on their true meaning.

This court, by the opinion of the present chief justice in *Gerber v. Ackley*, 37 Wis. 43, 19 Am. Rep. 751, defined these words as 'acts done within the authority of the officer, but in doing them he exercises that authority improperly, or abuses the confidence which the law reposes in him.' Acts *colore officii* are defined in the same opinion as "where they are of such a nature that his office gives him no authority to do them." It is foreign and confusing to the question to define acts *colore officii*. Acts *virtute officii* only are protected by the statute. We might as well define acts which are of neither class. It is sufficient if we determine what acts are within the statute. In the above case the plaintiff had sued the city marshal for the taking of certain property, and the defendant attempted to justify the taking, but averred only that he took the property "by virtue of an alleged writ of replevin": *Gerber v. Ackley*, 32 Wis. 233. The plaintiff recovered judgment. The above action is on the marshal's official bond, and against the defendant as surety thereon, and the case depended upon whether the marshal acted with authority, or *virtute officii*, when he took the property. It was held that the marshal did not show that he acted under authority, because he did not allege that he had any writ, but only that he took the property by virtue of an alleged writ, in effect holding that if he had alleged that he acted under an actual writ, it would have been by virtue of his office, and the surety would have been liable. This distinction affords more aid in defining *virtute officii* than the above definition, for here it has application. It is acting as an officer under a valid writ. But the case of *State v. Mann*, 21 Wis. 684, is authority in point. This was an application for a peremptory writ of *mandamus* to compel the circuit judge to grant leave to the plaintiff to bring suit on the official bond of the sheriff. The *mandamus* was refused on the sole ground that the affidavit of the relator failed to

state a case in which the sheriff was liable for acts done by virtue of his office. The affidavit stated in substance that while acting as such sheriff, having a warrant of attachment against the property of A, he seized and carried away the property of B, and failed to state that he did so under and by virtue of the writ of attachment. If he had so stated, this court held that for a trespass thus committed the sureties on the official bond would be liable, because committed by virtue of his office. This was the exact question here presented. The writs of attachment and execution were levied upon the property of the plaintiff instead of that of the defendant therein, and hence this suit. The case of *People v. Schuyler*, 4 N. Y. 173, is cited in the opinion as the authority followed. That case was an action on the bond of the sheriff by the claimant of the property attached, and presented the same question. The case of *Taylor v. Parker*, 43 Wis. 78, is not in conflict with these decisions, for in that case the action was for the breach of the condition of the bond for not paying over money collected by the sale of the plaintiff's property; and the case was governed by the strict condition of the bond. The above cases are not referred to as being overruled by or in conflict with the above cases.

In *Cumming v. Brown*, 43 N. Y. 514, the decision in *People v. Schuyler*, 4 N. Y. 173, was approved, and this case presented the same question. The ninety-third section of the code contains the same provision of our statute of limitation as to such cases. *Coddington v. Carnley*, 2 Hilt. 528, is to the same effect. In *Charles v. Haskins*, 11 Iowa, 329, 77 Am. Dec. 148, it is held that the sureties on the official bond of the sheriff are liable for his having levied the attachment on the property of the plaintiff, a stranger to the writ, on precisely the same ground; and the same is held in *Van Pelt v. Littler*, 14 Cal. 194, in a suit on a constable's bond by a stranger to the writ, for such a trespass; and the same in *Horan v. People*, 10 Ill. App. 21. In *Daniel v. Wilson*, 5 Term Rep. 1, an excise officer, in pursuit of smugglers, arrested an innocent third person. The question was, whether the one month notice ought to be given before suit, as in cases where the act was done "in the execution of his office." It was held to be within the statute. In *Weller v. Tole*, 9 East, 364, one magistrate committed the plaintiff to custody for not filiating his bastard child, upon a summons to appear before himself, when the law required two magistrates to act in such a case.

It was held that he acted by virtue of his office, because he had authority to act in such a case, although he could not act alone, and was entitled to notice before suit. It is held in *Turner v. Sisson*, 137 Mass. 191, that a constable seizing the goods of one, on a writ against another, was acting officially by virtue and under color of his office. In *People ex rel. v. Mersereau*, 74 Mich. 687,—a similar case,—the holding was the same. In *Lammon v. Feusier*, 111 U. S. 17, it was held that when a marshal levied a writ of attachment on the goods of the defendant, or of a stranger, it was “an official act.” In *Seeley v. Birdsall*, 15 Johns. 267, it is held that an action against a sheriff for a false return is within the statute that makes actions against any sheriff for “anything done by him by virtue of his office” local to the county where the act was committed.

In *Kendall v. Aleshire*, 28 Neb. 707, 26 Am. St. Rep. 367, the sheriff had a warrant for the arrest of the plaintiff in Nebraska. The plaintiff was in Kansas, and the sheriff represented to him that he had an extradition warrant for his arrest, and he submitted to such arrest and returned with the sheriff to Nebraska. It was held that the sheriff had a warrant for his arrest in Nebraska, but that he had no right to arrest the plaintiff on it there, as he had fraudulently induced him to return to that state; and that the act of the sheriff in so wrongfully arresting the plaintiff in that state was *virtute officii*, and for it the sureties on his bond were liable. This case illustrates the principle of an official act by virtue of the office, in application to this case, very clearly. The sheriff had a warrant and authority to make the arrest, but for certain reasons *in pais* had no right to make the arrest upon it as he did. In this case, the sheriff had lawful writs of attachment and execution, but had no right to seize the property of the plaintiff on them.

In *Parton v. Williams*, 8 Barn. & Ald. 330, the constable, with a warrant to take the goods of A, took those of B, and it was held that he acted by virtue of his office, and was protected by a similar statute of six months. In *Theobald v. Crichmore*, 1 Barn. & Ald. 227, a constable, having a warrant of distress against the plaintiff, unlawfully broke and entered his dwelling-house. It was held that he was acting in pursuance of his authority, but exceeded it, and that the act was *virtute officii*, and protected by the six months statute of limitation. In *Smith v. Wiltshire*, 2 Brod. & B. 619, a con-

stable, with a warrant to search for black cloth, took cloth of other colors. It was held that he acted under authority, but abused it, and was entitled to the protection of the six months statute of limitation. The cases of *Archer v. Noble*, 3 Me. 418, and *Harris v. Hanson*, 11 Me. 241, follow *People v. Schuyler*, 4 N. Y. 173. *Carmack v. Commonwealth*, 5 Binn. 184, *Forsythe v. Ellis*, 4 J. J. Marsh. 299, 20 Am. Dec. 218, and *Commonwealth v. Stockton*, 5 T. B. Mon. 192, are similar cases.

In the above cases against the sureties on the bond of the sheriff or constable, the conditions of the bond were such that the principle is precisely the same as in this case, and the liability of the sureties and the statute of limitations rest upon the same ground. Such cases are therefore in point. The above cases in other states are cited to strengthen, if they need it, the above decisions of this court clearly in point.

The learned counsel of the appellant may have cited some cases in point the other way, but most of them have application only by loose and general language in defining the terms *colore* and *virtute officii*, when the facts are neither parallel nor analogous. *People ex rel. v. Lucas*, 93 N. Y. 585, is like *Taylor v. Parker*, 43 Wis. 78, and depended upon the conditions of the bond. In *Morris v. Van Voast*, 19 Wend. 283, the sheriff was sued in trespass for taking the property of the plaintiff on a writ of replevin against him, and the sheriff pleaded this statute of limitations. The court held that he acted *colore officii* only, because there was no bond given with the writ, and therefore he had no authority to take the property. It follows from the decision that if the bond had been given, the act would have been *virtute officii*. *Ohio v. Jennings*, 4 Ohio St. 418, supports the doctrine contended for by the learned counsel of the respondent. It is held that the sureties on the sheriff's bond are liable for his taking the goods of A on the writ against B. To be so liable, the act must have been *virtute officii*. It may be called "colorable" authority in the opinion, but it clearly means "official" authority, as the decision shows. In *Lowell v. Parker*, 10 Met. 309, 43 Am. Dec. 436, the sheriff took the goods of a stranger on mesne process. He was held liable on his bond, because it was a breach of his official duty, but it is carelessly said that he took the goods *colore officii*. *State v. Conover*, 28 N. J. L. 224, 78 Am. Dec. 54, is a case in point that the sureties of the sheriff are not liable for his taking the property of

a stranger to the writ. But that case was so decided because the court was unwilling to adopt the principle and reasoning of the great number of cases cited in the opinion as the other way. That court seems to have been able to find but very few cases claimed to be in point to sustain the opinion.

It seems to me that this principle is sustained by reason as well as by great preponderance of authority. It is impossible to find any case that would be protected by the statute of limitations if this is not. The statute could have no application or force on any other principle. If the sheriff had full and lawful authority, and executed that authority properly, then he would not be liable; and he needs no statute of limitation. The sheriff has lawful process and executes it, and makes his return, and it becomes a record. These are all within his lawful authority. He may be liable for an abuse of his authority or oppression, for arresting the wrong person or taking the property of a stranger, or for making a false return. If the sheriff is not liable for these consequences of the execution of his lawful authority, he is not liable at all. The respondent here held valid writs of attachment and execution against the property of Armstrong. He executed the writs by taking the property as the property of Armstrong. In doing so, he performed his official duty, and according to the forms of law. He did this by virtue of his office. If he found the property in the undisputed possession of the defendant, or if the plaintiff has indemnified him for taking it, it is his duty to take it. He has discharged his whole official duty according to law, and yet he is liable for taking the property of a stranger as the real owner. It would seem that the statute was made for just such a case. The sheriff has a writ for John Doe, and he arrests John Doe, but not the person complained of, but another person of the same name, who sues him for false imprisonment. May he not have the protection of this statute of limitations? Why not? And yet he cannot, unless he acted by virtue of his office. How can he act by virtue of his office, and yet be liable so as to need the protection of the statute? He has no right to levy upon the property of a stranger. Neither has he the right to abuse his process, or oppress or arrest the wrong person, or make a false return. These are all the wrong and unauthorized acts he can do while executing lawful authority, by which he will incur any liability; and they are of the same nature and character, and they all

clearly come within the statute. The statute of limitations was properly pleaded, and the demurrer properly overruled.

By the COURT. The order of the circuit court is affirmed.

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SHERIFFS — ACTS OF, WHEN REGARDED AS OFFICIAL. — For a discussion of this subject, see note to *Palmer v. St. Albans*, 6 Am. St. Rep. 132.

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## HERMES v. CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

[80 WISCONSIN, 590.]

EVIDENCE — RES GESTÆ — DECLARATIONS OF AN ENGINEER, MADE WITHIN A FEW MOMENTS after a child was killed by being run over by a locomotive in his charge, are admissible as part of the *res gestæ*.

EVIDENCE. — RES GESTÆ MEAN the circumstances, facts, and declarations which grow out of the main fact, contemporaneous with it, and serve to illustrate its character.

APPELLATE PRACTICE — INJURY WHEN NEED NOT BE SHOWN. — ORDER SUSTAINING OBJECTION TO A QUESTION CALLING FOR EVIDENCE ADMISSIBLE as part of the *res gestæ* entitles the party whose evidence is excluded to a new trial, though there is nothing to show whether or not the evidence would have been material had it been admitted.

JURY TRIAL. — EVIDENCE AS TO HOW FAR A CHILD COULD HAVE BEEN SEEN at a time and place designated is properly excluded, because it is for the jury to determine that question from all the facts and circumstances disclosed to them.

ACTION to recover damages for the killing of a child at a highway crossing. The court directed a verdict for the defendant, and the plaintiff appealed.

*Wigman and Martin*, for the appellant.

*Winkler, Flanders, Smith, Bottum, and Vilas*, for the respondent.

COLE, C. J. It was error to sustain the objection to the question asked the witness Hubert Hermes, as to whether he heard the engineer say anything as to how he came to run over the child. This conversation between the witness and the engineer was within a very few minutes after the child was killed, and there can be no doubt that what the engineer said about the accident was a part of the *res gestæ*, and was admissible on that ground. "The idea of the *res gestæ* presupposes a main fact or principal transaction, and the *res*



*gestæ* mean the circumstances, facts, and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character": *Carter v. Buchannon*, 8 Ga. 513; 1 Greenl. Ev., sec. 109 et seq.; *Hooker v. Chicago etc. R'y Co.*, 76 Wis. 547; *Keyser v. Chicago etc. R'y Co.*, 66 Mich. 390; *O'Connor v. Chicago etc. R'y Co.*, 27 Minn. 166; 38 Am. Rep. 288; *Insurance Co. v. Mosley*, 8 Wall. 397; *Hanover R. R. Co. v. Coyle*, 55 Pa. St. 396. There is nothing in this case which can distinguish it from that of *Hooker v. Chicago etc. R'y Co.*, 76 Wis. 547. There testimony of a witness as to what the engineer said about the accident was admitted on the trial, under objection, and this court held it was not error. As we have said, the conversation between the witness and the engineer occurred immediately after the accident. The declaration of the engineer had or might have had a tendency to explain how it happened. It surely grew out of that transaction, and served to illustrate its character.

But it is said the record does not disclose the purpose for which the question was asked, nor show that the answer to the question would have been material. If it was a part of the *res gestæ*, as we think it was, the plaintiff was entitled to have it before the jury for what it was worth. The surrounding circumstances, constituting parts of the *res gestæ*, may always be shown to the jury, along with the principal fact: 1 Greenl. Ev., sec. 108. It is impossible to say that it did not have a direct and close relation to the main fact being investigated, — as to how the child happened to be killed. Of course we do not know how material or important the declarations of the engineer might have been, whether he admitted he should have seen the child in time to stop the train, and was careless in not doing so, or what in fact he said to the witness about how he came to run over the child. It is sufficient to say the question was a proper one, and should have been answered. There must be a new trial because this evidence was excluded.

We see no error in excluding other testimony. The question asked the plaintiff, as to how far a child sitting or lying on the crossing could be seen that day, was properly ruled out. That was for the jury to decide, in view of all the circumstances, the condition of the track, the state of the weather, and all other facts bearing on that issue. It is, however, claimed that there was no evidence of negligence on the part of the employees of the defendant to carry the case to the



jury. It is not proper for us at this time to express an opinion as to the weight of the testimony on that point, further than to say we think the case should have been submitted with all competent testimony. It is not entirely clear that the child could not or should not have been seen sitting on the track, if the engineer and fireman had been vigilant and careful in looking ahead for objects, in time to avoid the accident. It was a clear, bright day, and there was nothing to prevent one from seeing an object at a considerable distance if he had been on a sharp lookout for it.

By the COURT. The judgment of the circuit is reversed, and a new trial ordered.

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**EVIDENCE — RES GESTÆ — WHAT CONSTITUTES.** — *Res gestæ* are those circumstances which are the incidents of a particular act and illustrative of it. They must stand in immediate causal relation to the act, but may be separated from it by a more or less appreciable lapse of time: *Ward v. White*, 86 Va. 212; 19 Am. St. Rep. 883, and note; *Lewis v. State*, 29 Tex. App. 201; 25 Am. St. Rep. 720, and note. See also *Chicago etc. R'y Co. v. Becker*, 128 Ill. 545; 15 Am. St. Rep. 144, and note.

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## NELSON v. McDONALD.

[80 WISCONSIN, 605.]

**DEED, BLANKS IN.** — **AUTHORITY BY PAROL** may be given to fill material blanks in a mortgage or other sealed instrument; and when such authority is given, and the agent exceeds his instruction in filling the blanks, and negotiates the instrument to an innocent third person, the principal is bound by the acts of his agent, though unauthorized. Therefore, if a wife signs and delivers to her husband a mortgage with a blank as to description, relying upon his statement that it is to cover certain land belonging to him, and he inserts in the mortgage a description of their homestead, she is bound by this act of her husband.

**MARRIED WOMAN IS PERSONALLY LIABLE ON A NOTE** signed by her and her husband, and by her delivered to him with authority to negotiate it.

**SUIT to foreclose a mortgage.** The defendant, Emily McDonald, signed a note with her husband in favor of the plaintiff, and also a mortgage, blank as to description of property, relying upon the representation of her husband that the description should be filled in so as to cover certain mill property. He, however, inserted in the blanks a description of the family homestead, title to which was vested in his wife, and then negotiated the note and mortgage to the plaintiff, who had no notice of any fraud on the wife. She appealed from the judg-

ment of the court foreclosing the mortgage and also making her personally liable for the note.

*O. E. and Y. V. Dreutzer*, for the appellant.

*Greene and Vroman*, for the respondent.

WINSLOW, J. The case is hard, in that it imposes a lien upon the property of a confiding wife, for which she has received nothing, but it is ruled by well-established legal principles. These principles are laid down notably in two decisions made by this court, viz., *Johnston Harvester Co. v. McLean*, 57 Wis. 258; 46 Am. Rep. 39; and *Van Etta v. Evenson*, 28 Wis. 33; 9 Am. Rep. 486. The substantial conclusion of these decisions is, that authority may be given by parol to fill material blanks in a mortgage or other sealed instrument, as well as in negotiable paper, and that when such authority is given, and the agent exceeds his instructions in filling the blanks, and negotiates the instrument with innocent third persons, the principal will be bound by the acts of his agent, although unauthorized.

This rule is just and salutary. It places the loss, if there be loss, upon the person who endowed the agent with apparent authority, and not upon the innocent third person who trusted to such apparent authority, and parted with money or property in consequence of such trust. This rule is decisive of this case, for under it the mortgage must be held valid. Acknowledgment was not essential: *Leinenkugel v. Kehl*, 73 Wis. 238.

It is objected that there should be no personal judgment ordered against Emily McDonald, because she was a mere accommodation maker of the note. Upon this point the circuit judge well says: "By signing a joint note with her husband she clothed him with *prima facie* evidence of her intention to charge her separate estate." She ought not to be heard now to deny that apparent intention, as against an innocent third party who has advanced money upon the faith thereof.

By the COURT. Judgment affirmed.

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AGENCY — EFFECT OF VERBAL AUTHORITY TO FILL BLANK IN SEALED INSTRUMENT. — A principal who verbally authorizes an agent to fill up a blank in a bond is bound by such bond, where money is received from one acting in good faith and without knowledge: *Humphreys v. Finch*, 97 N. C. 303; 2 Am. St. Rep. 293, and note. One signing a blank bill and delivering it to another thereby authorizes such person to fill in the blank, and will be liable for the act of such person: *Davis v. Lee*, 26 Miss. 505; 59 Am. Dec.

267, and note; *Stahl v. Berger*, 10 Serg. & R. 170; 13 Am. Dec. 666, and extended note; note to *Spiller v. James*, 2 Am. Rep. 340.

**HUSBAND AND WIFE — HUSBAND AGENT FOR WIFE — LIABILITY OF WIFE.** — A married woman who executes a deed of her property and delivers it to her husband to enable him to borrow money from the grantee, without limiting him as to the amount, thereby authorizes him to borrow such sum as he may see fit: *Bull v. Coe*, 77 Cal. 54; 11 Am. St. Rep. 235. A wife will be bound where she executes a deed of real estate in blank as to the grantee, and the amount of the consideration, and delivers it to her husband with implied authority to fill the blanks; *Reed v. Morton*, 24 Neb. 760; 8 Am. St. Rep. 247, and note.

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## YORK v. HINKLE.

[80 WISCONSIN, 624.]

**DURESS OF PROPERTY** cannot exist without there being a threat to do some act which the threatening party has no legal right to do, — some illegal exaction, or some fraud or deception. The restraint must be imminent, and such as to destroy free agency in a mind of ordinary firmness, without present means of protection.

**DURESS.** — A TRANSFER OF STOCK OF A CORPORATION CANNOT BE AVOIDED ON THE GROUND OF A THREAT that if such transfer was not made to a creditor of the corporation, he would take immediate steps to charge the property of the corporation with a large sum of money which it was owing to him, and that if the sale of the stock to any other person was attempted, such person would be informed of the existence of this corporate debt, and of the intention of the creditor to enforce its payment, and the sale of the stock would thereby be prevented.

**DURESS OF PROPERTY — CORPORATIONS.** — ONE WHO PLACES HIS MONEY AND PROPERTY IN A CORPORATION, and thereby subjects it to the control of a majority of the stockholders, cannot avoid a transfer of his stock on the ground that it was induced by the threat of his co-stockholders to manage unwisely the corporate business.

SUIT in equity to set aside a transfer of certain land and stock. The complaint alleged that the plaintiff and others donated land of the value of fifteen thousand dollars, and upwards, to a corporation as a bonus to induce it to erect a blast-furnace; that the defendant W. H. Hinkle agreed to aid in organizing the corporation, and in placing its stock; that the plaintiff, for the transfer to the corporation for a site for its works, was to receive ten thousand dollars in stock; that he further purchased lands for the corporation, and paid therefor six hundred dollars of his own moneys; that the defendant A. H. Hinkle loaned the corporation two hundred thousand dollars, with an understanding that it might be kept as long as needed, but this understanding, through the willful neglect of the defendants, was not expressed in any agreement; that

the plaintiff subscribed for two thousand five hundred shares of the stock of the corporation, and paid thereon seventeen thousand five hundred dollars; that the defendants conspired to obtain plaintiff's stock at much less than its value, and in pursuance of such conspiracy, knowing the plaintiff to be temporarily embarrassed, W. H. Hinkle told plaintiff that A. H. Hinkle would take plaintiff's stock, and pay therefor fifteen thousand dollars, but that plaintiff must release all claims against the corporation, and that if he did not accept this, A. H. Hinkle would at once enforce payment of the two hundred thousand dollars owing to him, and would, if necessary, have the works of the corporation stopped, and that plaintiff could take the amount offered him or nothing; that if he undertook to sell his stock to any other person, it would be necessary to transfer it upon the books of the corporation, and before such transfer was made, any intending purchaser would be informed of what A. H. Hinkle intended to do, and would be prevented from accepting the stock; that, including the moneys actually paid and the value of the site given by the plaintiff to the corporation, his stock had cost him twenty-five thousand dollars; that the site was worth one hundred and fifty thousand dollars; and that the plaintiff had been induced to transfer it to the corporation upon the agreement that he was to retain his position as manager and his share of the profits, and for the same reason, he had also given the use of a block of land worth five hundred dollars per year; and that the defendants, by the means employed, had forced plaintiff to accept said fifteen thousand dollars, and to transfer his stock, and release the corporation from all claims against it. Defendants demurred to the complaint, on the ground that it did not state facts sufficient to entitle plaintiff to relief. Demurrer being sustained, he appealed.

*G. W. Hazelton*, for the appellant.

*Tomkins, Merrill, and Smith*, for the respondents.

CASSODAY, J. This action is to set aside the assignment of stock and the conveyance of land mentioned in the foregoing statement, on the ground that they were obtained by duress. The alleged duress is to the effect that William H. Hinkle, under the circumstances mentioned in the foregoing statement, informed the plaintiff that A. Howard Hinkle wanted his stock, and would give him for it fifty per cent of its par value;

that if the plaintiff refused to accept, A. Howard Hinkle would take immediate legal steps to charge the company's property with two hundred thousand dollars indebtedness then due to him for the borrowed money mentioned; and that the defendants would notify any person proposing to purchase the plaintiff's stock of these facts. It will be observed that no threat of doing any act is alleged, which the defendants, or one or more of them, did not have the power and legal right to do. There is no intimation in the complaint of any duress of the person. The most that is claimed is that there was duress of property or rights of property. But there can be no such duress without some illegal exaction, or some fraud or deception. The restraint must be imminent, and such as to destroy free agency in a mind of ordinary firmness, without the present means of protection: *Radich v. Hutchins*, 95 U. S. 210; *Wilcox v. Howland*, 23 Pick. 167; *Forbes v. Appleton*, 5 Cush. 115; *Benson v. Monroe*, 7 Cush. 125; 54 Am. Dec. 716; *Natcher v. Natcher*, 47 Pa. St. 496; *Miller v. Miller*, 68 Pa. St. 493; *Heysham v. Dettre*, 89 Pa. St. 506; *Hackley v. Headley*, 45 Mich. 574; *Swanston v. Ijams*, 63 Ill. 165; *Harrison v. Milwaukee*, 49 Wis. 252. See cases carefully classified in 6 Am. & Eng. Ency. of Law, 57 et seq. Lord Denman, C. J., went so far as to say that "the fear that goods may be taken or injured does not deprive any one of his free agency who possesses that ordinary degree of firmness which the law requires all to exert": *Skeats v. Beale*, 11 Ad. & E. 990.

It does not appear from the complaint that the indebtedness of the company to A. Howard Hinkle for borrowed money was not due and enforceable at the time of the alleged duress; but, on the contrary, it is fairly inferable therefrom that it was then due and enforceable. It does not appear therefrom that the plaintiff's position, as vice-president and general manager of the company, was secured to him permanently or for any definite length of time; but, on the contrary, it is fairly inferable therefrom that, like all other officers and agents of the corporation, he was subject to displacement by a majority of the stockholders. In case the defendants had concluded to execute such threats, there would have been no obligation on their part to keep the same silent, or refrain from informing persons proposing to purchase the plaintiff's stock. No fraud or deceit is alleged. It is true, the plaintiff had put his money and property into the corporation which was subject to the control of a majority of the stockholders; and they may have

threatened to unwisely manage it; but such action on his part was voluntary, and with full knowledge that he was thereby subjecting his property to the management and control of such majority. Besides, such majority could do nothing to injure the intrinsic value of the plaintiff's stock which would not have a corresponding effect upon their own stock. The relation of the defendants to the plaintiff, in the transaction alleged, was not that of trustees to their *cestui que trust*, or that of fiduciary agents to their principal; and hence the authorities cited by the learned counsel for the plaintiff are, in our judgment, inapplicable. The demurrer was properly sustained.

By the COURT. The order of the circuit court is affirmed.

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**DURESS OF PROPERTY — WHEN EXISTS.** — Refusal on demand to pay a debt due, thereby causing the creditor to receipt in full, though only a partial payment was made, does not constitute duress where the debtor has done nothing unlawful to cause the creditor's financial embarrassment: *Adams v. Schiffer*, 11 Col. 15; 7 Am. St. Rep. 202, and note, discussing what constitutes duress of property. A deed is not given under duress when it is made as counter-security to sureties upon their threat to compel by legal process the settlement of the matters for which they are sureties: *Hunt v. Bass*, 2 Dev. Eq. 292; 24 Am. Dec. 274, and note. One who voluntarily pays money with full knowledge of the facts of the case, though there was no consideration, and it was paid under protest, cannot recover it back: *Claffin v. McDonough*, 33 Mo. 412; 84 Am. Dec. 54, and note.

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## JOHNSON v. CHICAGO, ST. PAUL, MINNEAPOLIS, AND OMAHA R. R. Co.

[80 WISCONSIN, 641.]

**WATERS, SURFACE, RIGHT TO OBSTRUCT.** — The owner of an estate, for the purpose of securing or protecting his reasonable use and enjoyment, may obstruct and divert surface waters thereon, which have come from higher levels, by embankments, ditches, drains, culverts, and other structures; and in so doing may lawfully hinder the natural flow of such waters, and turn the same back upon or off onto or over the lands of other proprietors, without liability for injury ensuing from such obstruction or diversion.

**SURFACE WATERS.** — One proprietor may turn and divert surface waters from his land onto the land of another, and such other proprietor may in turn divert the same onto the land of his adjacent neighbor, and so on. Each proprietor may thus pass on surface water, and there is no remedy except in doing so.

**ACTION** to recover damages alleged to have arisen from the diversion and discharge of surface waters. Verdict and judgment for plaintiff. Defendant appealed.

*Tomkins and Merrill*, for the appellant.

*Lamoureux, Gleason, Shea, and Wright*, for the respondent.

ORTON, J. This action is brought by the plaintiff to recover damages of the defendant company for diverting surface water running across its lands to and over the premises of the plaintiff. The railway track of the defendant runs east and west along the center of Fourth Street of the city of Ashland, and the street is between blocks 28 and 29 on the north, and blocks 47 and 48 on the south; and the defendant also owns the north half of the said last-mentioned blocks, on which it has three side-tracks, leaving the main track west of said blocks and running southeast. The premises of the plaintiff are lot 11 in block 28, — the second lot north of Fourth Street; and the brother of the plaintiff owns the intervening lot. These blocks lie between Eleventh and Beaser avenues on the east and west — Eleventh Avenue on the east, and Beaser Avenue on the west. There is a ravine coming down from the south on the land of the defendant, and running to Eleventh Avenue, and thence turning northeast towards the lake, by which surface water, in the time of rains, is carried across the railway track; and just north of the track there is a swale of some depth at the center, which is filled up in the time of rains, and the water runs off in said ravine towards the lake. There is another ravine, or low place, turning towards the northeast from or near the upper end of the other ravine last mentioned. The defendant made a culvert under its track for the water in the first-mentioned ravine to run off north towards the lake, and cut a ditch along the south side of its track from near said culvert to a point on Twelfth Avenue to meet another ditch running through the low ground or ravine second above mentioned; and thence there was constructed a box-drain along the south side of the track to carry the water on towards the west, to a point on Fourth Street opposite the plaintiff's lot, where a culvert under the track was constructed to carry the water off northwest towards the lake, over and through the plaintiff's lot, after passing the lot of his brother. The track of the Northern Pacific railway runs east and west along Fifth Street, south of Fourth Street. There is a ravine from the south of Fifth Street, and southwest of the southwest corner of block 47, and running northwardly to the last-mentioned culvert, opposite plaintiff's premises, by which surface water is carried through a culvert under the track of the Northern



Pacific road, and on through the culvert opposite plaintiff's premises, and across the same towards the lake.

These culverts of the defendant under the embankment and track appear to be placed where the surface water formerly passed towards the lake, and there does not appear to have been made very much change in the natural or former running of the surface water towards the lake by the defendant by its ditches, box-drain, and culverts. Perhaps some more water than formerly is made to pass across the defendant's track opposite the plaintiff's premises; but this would seem to be on account of the natural descent of the ground. The plaintiff testified that the water naturally ran across his lot, and that the ground slopes from Fourth Street towards his place, and his lot slopes towards his house, and that his house stands in low ground, and that he put in a drain to divert the water from his cellar, and the drain was stopped up when and a week before he brought this action. He testified also that the water ran across his lot and on northwesterly before the track was laid, and that he and his brother made a dam on the south side of his brother's lot to keep the water from running across the lots, but that it was not high enough in times of heavy rains; and that he built his house in the summer of 1883, and the defendant laid its track opposite his house the same summer.

From this description of the locality, it would seem that the defendant company took the only proper measures to pass on the surface water towards the lake, consistent with the building and use of its railway. An embankment along Fourth Street was necessary, as that would dam up the surface waters coming across their grounds from the south, in order to pass them off through these culverts a proper distance apart. The ditches and box-drain were necessary to direct the water to the culverts. The plaintiff complains that the company's works retard the running off of the waters from the swale or deep place near Eleventh Avenue and south of its track; and that when filled up it is three or four feet deep. It may take longer time for the water to run off when this swale is filled up, but its depth cannot injure the plaintiff, for while it stands in the swale it does not run out from the bottom, and only so much can run from its surface, and when low enough it stops running out, and it has to dry up where it is. There is no more surface water running in the ravines and north towards the lake than before the railway was built, and it is



now disposed of by the defendant in the only way consistent with the enjoyment of its property. It is not questioned but that the waters which the defendant has to some extent diverted to the premises of the plaintiff consist of mere surface waters, "flowing in hollows or ravines in land, which is the mere surface water from rain or melting snow, and is discharged through them from higher to lower levels, but which at other times are destitute of water," according to the definition given in *Lessard v. Stram*, 62 Wis. 112; 51 Am. Rep. 715. There may be occasionally many small streams or rivulets gathered from the surface which constitute these surface waters, but none of them are watercourses, "which flow in a particular direction, through definite channels, having beds, sides, or banks, and usually discharge themselves into some other stream or body of water": *Hoyt v. Hudson*, 27 Wis. 656; 9 Am. Rep. 473.

The true rule in respect to surface waters, as gathered from the cases, is, that "the owner of an estate, for the purpose of securing or protecting its reasonable use and enjoyment, may obstruct or divert surface waters thereon, and which have come down from higher levels, by embankments, ditches, drains, and culverts, and other constructions; and in doing so may lawfully hinder the natural flow of such waters and turn the same back upon or off onto or over the lands of other proprietors, without liability for injuries ensuing from such obstruction or diversion." *Lessard v. Stram*, 62 Wis. 112, 51 Am. Rep. 715, is very much in point with this case. "Stram, in order to prevent the water from overflowing his low lands, and remaining there to his damage, constructed an embankment or dam from one to three feet in height, at the east end of his land, and such embankment or dam stopped the water near the mouth of the *coulées*, and turned it south along the foot of the bluffs in the direction of the plaintiff's land. Other defendants had lands lying next south of Stram's land, and they also constructed low embankments across the east ends of their tracts of land, so as to continue the flow of the water which, coming out of the *coulées* after any considerable rain, or after the melting of the snow, would and did flow south along the foot of the bluffs until it reached the plaintiff's land, where, on account of the formation of the surface thereof, it accumulated and remained stagnant, to his injury." On these facts the circuit court granted a nonsuit, and this court affirmed the judgment. The doctrine here sanctioned is, that one proprietor

may turn and divert surface water from his own land onto the land of another, and such other proprietor may turn and divert the same waters onto the land of his adjacent neighbor, and so on. Each proprietor may thus pass on surface water, and there is no remedy except in doing so. The cases sanctioning this doctrine are too numerous to be cited: *Waters v. Bay View*, 61 Wis. 642; *Allen v. Chippewa Falls*, 52 Wis. 430; 38 Am. Rep. 748; *Hanlin v. Chicago etc. R'y Co.*, 61 Wis. 515; *O'Connor v. Fond du Lac etc. R'y Co.*, 52 Wis. 526; 38 Am. Rep. 758; *Eulrich v. Richter*, 87 Wis. 226; *Fryer v. Warne*, 29 Wis. 511; *Gannon v. Hargaden*, 10 Allen, 106; 87 Am. Dec. 625. In *Jordan v. St. Paul etc. R'y Co.*, 42 Minn. 172, the railway company cut and dug two large ditches, one on each side of its road-bed, six miles long, and connected them with five large culverts, which accumulated enormous quantities of water by draining the wet lands in the vicinity and from surface waters thereon, and forced the waters to run in large and destructive currents through the ditches and culverts over the lands of the plaintiff, and overflowed them. It was held that the railway company had the right to do this to protect its own lands and property, and that the plaintiff could not recover any damages caused thereby. Many other cases are cited in appellant's brief to similar effect.

The learned circuit court instructed the jury as follows: "The defendant had no right, by embankment, drains, ditches, culverts, or other artificial means, to collect surface water upon its lands in large quantities, obstructing the natural flow thereof, and by these means causing it to flow in an unnatural manner and increased quantities upon the land of the plaintiff; and if you believe from the evidence that the defendant has, by means of drains, ditches, culverts, or barriers, so obstructed, collected, and diverted the natural flow of the surface water as to force an increased quantity upon the plaintiff's land, then the defendant is liable for the injury the plaintiff has sustained on account of such acts of the defendant." This instruction was excepted to by the defendant's counsel. The first part of the instruction is an abstract proposition of law, and not only an improper instruction on that account, but inapplicable to the facts of the case, for the defendant had not "collected large quantities of surface water on its land," and besides this, it is very bad law in every respect. The last and proper part of the instruction is clearly in violation of the established and uniform doctrine of the books, as we have already

shown. If this instruction be the law, then no one can, under any circumstances, divert surface water from his own land for any purpose to the lands of others, to their injury in the least. This instruction was clearly erroneous. There was another instruction excepted to which is also erroneous, and that is, that the plaintiff was entitled to recover as for permanent injury to his land, or as for condemnation of his land to the use of the defendant, by the rule of the difference of its value before and after the ditches, drains, culverts, and embankments were constructed. They may be changed so as to produce no injury to the plaintiff.

The motion of the defendant to set aside the verdict and for a new trial, on the ground that the verdict was contrary to the law and the evidence, was denied, and exception taken. We have already seen that the verdict is contrary to the evidence as well as the law. The verdict for the plaintiff was five hundred dollars, and judgment was rendered thereon.

By the COURT. The judgment of the circuit court is reversed, and the cause remanded for a new trial.

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**WATERS — SURFACE — RIGHT TO OBSTRUCT.** — The owner of the lower estate may, in the use and improvement of his land, obstruct or hinder the natural flow of surface water, and turn it back upon the lands of others, without liability for such obstruction: *Ross v. St. Paul etc. R'y Co.*, 41 Minn. 384; 16 Am. St. Rep. 706, and note; *Chadeayne v. Robinson*, 55 Conn. 345; 3 Am. St. Rep. 55; *Sweet v. Cutts*, 50 N. H. 439; 9 Am. Rep. 276, and note.

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**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**CALIFORNIA.**

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[IN BANK.]

**JANIN v. LONDON AND SAN FRANCISCO BANK.**

[92 CALIFORNIA, 14.]

**BANKS AND DEPOSITORS, RELATION BETWEEN — PAYMENT OF CHECKS. —** A bank, in receiving ordinary deposits, becomes the debtor of the depositor, and its implied contract with him is to discharge this indebtedness by honoring such checks as he may draw upon it, and it is not entitled to debit his account with any payments except such as are made by his order or direction.

**BANKS AND BANKING. — PAYMENT OF FORGED CHECKS** by a bank is made at its peril, and it is not justified in charging them against the depositor's account, unless some negligent act of his in some way contributed to induce such payment in the first instance, or unless, by his subsequent conduct in relation to the matter, he is equitably estopped to deny the correctness of such payment.

**BANKS AND BANKING — PAYMENT OF FORGED CHECK — NEGLIGENCE OF DEPOSITOR. —** In the absence of prior negligence by a depositor, inducing the payment of a forged check by a bank, it is not entitled to debit the amount thereof against his account, unless by reason of his subsequent negligence the bank has omitted to take proceedings which it otherwise could or would have taken to indemnify itself from loss.

**BANKS AND BANKING — ACCOUNT STATED AFTER PAYMENT OF FORGED CHECK — NEGLIGENCE OF DEPOSITOR — EVIDENCE. —** Where a bank balances a depositor's pass-book containing a debit against him for a payment made on a forged check, and returns the book to him at the same time, this constitutes a statement of his account, making it his duty to examine it within a reasonable time, and to return it to the bank, without unreasonable delay, with notice of his objections to it; and unless such objection is made within a reasonable time, it becomes an account stated, casting the burden of proof on the depositor to show that the check with which he is debited is a forgery, and if it is reasonably probable that the bank has been prejudiced by his unreasonable acquiescence in the account as thus stated, he will not be permitted to open it by proof of its incorrectness.

**BANKS AND BANKING — PAYMENT OF FORGED CHECK. — NEGLIGENCE OF DEPOSITOR,** consisting in his delay in discovering and giving notice to the bank that a check paid by it is a forgery, will not prevent his recovery against the bank, when it cannot possibly have been prejudiced by such delay, or prevented from taking steps, by the arrest of the forger, or by an attachment of his property, or other form of proceeding, to compel restitution.

**BANKS AND BANKING — PAYMENT OF FORGED CHECK — ESTOPPEL AGAINST DEPOSITOR. —** In an action by a depositor to recover the amount paid by a bank on a forged check, an estoppel against the depositor to deny his signature does not arise until there is some evidence of his negligence, or of other facts upon which it may be predicated. It cannot be based upon mere conjecture, even if a proper foundation is laid for it in other respects.

**BANKS AND BANKING — PAYMENT OF FORGED CHECK — NEGLIGENCE OF DEPOSITOR — BURDEN OF PROOF. —** In an action by a depositor against a bank to recover the amount paid by it on a forged check, the burden of proof is upon the bank to show that it sustained damage or injury by the negligence of the depositor, and this it is required to show by evidence having some reasonable tendency to establish such fact.

**EVIDENCE SUFFICIENT TO SUBMIT QUESTION TO JURY. —** To justify the submission of any question of fact to a jury, the proof must be sufficient to raise more than a mere conjecture or surmise that the fact is as alleged. It must be such that a rational, well-constructed mind can reasonably draw from it the conclusion that the fact exists, and when the evidence is not sufficient to justify such an inference, the court may properly refuse to submit the question to the jury.

*John B. Harmon, D. P. Belknap, Winans, Belknap, and Godoy, and Jarboe, Harrison, and Goodfellow, for the appellant.*

*W. H. L. Barnes and H. L. Gear, for the respondent.*

DE HAVEN, J. The plaintiff was a depositor in the bank of defendant, and the controversy in this action grows out of the payment by defendant of a check for sixteen thousand seven hundred dollars, purporting to have been signed by plaintiff, and for which amount defendant claims that it is entitled to debit the account of plaintiff. The complaint alleges that this check was a forgery. This is denied in the answer, and as another and separate defense, it is averred, in substance, that the plaintiff is estopped to deny the genuineness of said check because of his negligence in not examining his balanced pass-book and returned checks, including the one in dispute, within a reasonable time, and giving notice that such check was forged, "by reason of which laches defendant was prevented from tracing out the forger of said check or said signature, if it was a forgery, and proceeding against him, for a period of nearly five months, and until all trace of said forger was lost." The defendant also avers that

the account between itself and plaintiff had become a stated one.

The check was paid on May 29, 1878, and on September 4, 1878, the defendant returned to plaintiff his pass-book, showing the statement of his account at that date, and that he was charged with the amount of this check, which was also returned to him as one of the vouchers. On December 11, 1878, another statement of plaintiff's account was rendered by defendant, in which appeared the balance shown by the previous account. The evidence also tended to show that plaintiff did not at once examine the check in dispute when it was returned to him with his balanced pass-book on September 4, 1878, nor until some time in the month of December, 1878, and that he first intimated to defendant a doubt of its genuineness about December 28, 1878, but did not give notice that he actually claimed it to be a forgery until February 1, 1879.

The verdict of the jury in favor of plaintiff must be deemed, on this appeal, to have conclusively established the fact that the check was a forgery, as there was evidence sufficient to establish such a finding, and it is not claimed that there was any error in the instructions of the court, so far as they relate to that particular point.

It is well settled that a bank, in receiving ordinary deposits, becomes the debtor of the depositor, and its implied contract with him is to discharge this indebtedness by honoring such checks as he may draw upon it, and it is not entitled to debit his account with any payments except such as are made by his order or direction: *Crawford v. West Side Bank*, 100 N. Y. 50; 53 Am. Rep. 152; *Phoenix Bank v. Risley*, 111 U. S. 125. All unauthorized payments, such as upon forged checks, are therefore made at the peril of the bank, and it is not justified in charging them against the depositor's account, unless some negligent act of his in some way contributed to induce such payment in the first instance, or unless by his subsequent conduct in relation to the matter he is upon equitable principles estopped to deny the correctness of such payments. This view of the law cannot be well questioned, and finds abundant support in the decisions of courts: *Shipman v. Bank of State of New York*, 126 N. Y. 318; 22 Am. St. Rep. 821; *Hardy v. Chesapeake Bank*, 51 Md. 562; 34 Am. Rep. 325; *Weinstein v. National Bank*, 69 Tex. 38; 5 Am. St. Rep. 23; *Leather Manufacturers' Bank v. Morgan*, 117 U. S. 96.

It is not claimed in this case that plaintiff was guilty of any

prior negligence which induced the defendant to pay the check in dispute, and we are therefore to consider only the one general question, whether, upon the evidence before it, the court committed any error to the prejudice of the defendant in giving or refusing instructions relating to the defense of estoppel, and this we proceed to do.

The plaintiff was in no manner responsible for the action of the defendant in paying the check. In making such payment it parted with its own money, and not that of plaintiff, and the loss consequent thereon was its own, and should not be transferred to the plaintiff, unless, from all the circumstances in the case, it appears reasonably probable that but for his alleged negligence the defendant could have protected itself. The defendant has not in fact discharged its indebtedness to plaintiff, and should not be permitted to debit him with any amount as an offset thereto, unless it appears that by reason of the negligent conduct of plaintiff, it has omitted to take proceedings which it otherwise would and could have taken to indemnify itself from loss. This seems to us clear upon the plainest principles of justice. The balancing of the pass-book in September, and charging the plaintiff therein with the amount of this check, and its return to him at the same time, constituted a statement of the account between himself and the defendant, and it thereupon became the duty of the plaintiff to examine the same within a reasonable time, and give to defendant, without unreasonable delay, notice of any objection which he had to it; and unless such objection was made within a reasonable time, it became an account stated, and there was imposed upon the plaintiff the burden of showing that the check with which he was debited was a forgery; and in addition to this, if the circumstances attending the entire transaction were such as to make it reasonably probable that the bank had suffered prejudice by plaintiff's unreasonable acquiescence in the account as stated, he would not be permitted to open the account by proof of its incorrectness.

Upon the trial, the court instructed the jury, in substance, that if they found that the check in dispute was a forged one, they must find for the plaintiff, unless it was shown that plaintiff's failure to examine his checks deprived the defendant of an opportunity to save itself from loss on account of the money paid thereon; and they were further instructed that if "the plaintiff" was guilty of negligence in respect to his treatment of his checks, including the disputed check, after he



received them at the September balancing and the December balancing, or by reason of his making the discovery of the forgery, or of the facts which put him on inquiry respecting it, some months before he gave any notice to the bank of such discovery, whereby the bank was or may have been injured, they may find for the defendant." So far, this was a correct statement of the law, and, with other instructions given, conveyed to the jury with sufficient clearness the law as we have declared it. But the court also gave the following: "In considering the fact that Mr. Janin's bank-book was balanced, and that the bank's statement of the balance was apparently acquiesced in for a considerable length of time, I instruct you that the plaintiff was under no contract to the bank to examine with diligence his returned checks and bank-book. In contemplation of law, the book was balanced and the checks returned for the protection of the depositor, not for the protection of the bank; and when Mr. Janin failed to examine it, the only consequence was, that the burden of proof was shifted. Mr. Janin then became bound to show that the account was wrongly stated. This right he has preserved so long as the claim was not barred by the statute of limitations." This instruction, although apparently supported by the authority of *Weisser v. Denison*, 10 N. Y. 68, 61 Am. Dec. 731, is not, in our opinion, entirely correct, and is in conflict with the other instructions referred to. When considered in connection with a portion of another instruction given, to the effect that it "was sufficient to give notice when the forgery was discovered," this instruction clearly implied that plaintiff could not be charged with negligence in not examining his checks within a reasonable time, and that the jury were only to inquire whether he was guilty of unreasonable delay in giving notice after he made the examination and discovered the forgery. This is not the true rule; but the error found in this instruction will not, in view of the undisputed evidence, justify a reversal of the judgment. Conceding that the plaintiff was guilty of negligence in not earlier examining his checks, discovering the forgery, and giving notice thereof, there is nothing in the evidence from which it can be reasonably inferred that the defendant sustained any loss thereby, or that its position with reference to the check, because of not having earlier notice, was in any manner changed to its disadvantage, and the court would have been justified in so charging the jury. The check was paid on May 29, 1878, and it was not



until September 4, 1878, that it was returned to plaintiff. The check was payable to "currency or bearer," and when paid, the person who presented it was not identified or required to indorse it. This case was tried in 1885, and there is nothing in the evidence pointing to the fact that if notice had been given on the very day the check was returned, the defendant would have been in any better position to discover the forger, or the person who uttered it, or to avail itself of any of the coercive measures known to the law, by which to retrieve its loss, than it was at the time it received notice. If plaintiff was negligent, it was not shown that the defendant suffered any damage thereby; for that reason such negligence cannot be allowed as a defense to plaintiff's right to recover in this action.

There may be some general language in the case of *Leather Manufacturers' Bank v. Morgan*, 117 U. S. 115, which would seem to imply that it is not necessary that the evidence should tend to show that any pecuniary benefit would have accrued to the defendant if reasonable notice had been given it, but this general language is limited by the facts of that case, and the more specific rule which the court announced, viz.: "Still further, if the depositor was guilty of negligence in not discovering and giving notice of the fraud of his clerk, then the bank was thereby prejudiced, because it was thereby prevented from taking steps by the arrest of the criminal, or by an attachment of his property, or other form of proceeding, to compel restitution."

In the case of *Continental Nat. Bank v. Nat. Bank of Commonwealth*, 50 N. Y. 576, cited by appellant, it is said that the arrest and detention of a swindler are powerful means of coercing restoration of property, and that the loss of this means in relying upon the declaration of another would estop such person from denying the truth of the statement upon which reliance was made. But this language is to be considered in connection with the particular facts then before the court, and as pointed out in the subsequent case of *White v. Continental Nat. Bank*, 64 N. Y. 322, 21 Am. Rep. 612. The declaration held to be an estoppel in that case was the direct admission of the genuineness of the check afterwards claimed to be forged, and that "had the teller of the certifying bank disclaimed the forged certificate and pronounced it a forgery when presented, the holder of the check would have had ample time to arrest the swindler at the Bank of the State of New

York before he had received the money on the gold checks, and before he went to the subtreasury with his gold certificates."

The distinction between such a case as that and one like this, in which there is nothing in the evidence to indicate that all trace of the forger was not lost before the check in controversy was returned to plaintiff months after its payment, is a marked one; and in *White v. Continental Nat. Bank*, 64 N. Y. 822, 21 Am. Rep. 612, just cited, what we conceive to be the rule applicable to the facts in this record is thus stated: "In the case at bar it is the merest conjecture, with scarcely a possibility to support it, that the defendant, or those from whom it received the bill, could, at any time after the transmission of the foreign bill of exchange to Baltimore, have taken any effectual measures either for arresting the swindler or reclaiming the bill bought and paid for upon the credit of the bill. Estoppels cannot be based upon mere conjectures, even if a proper foundation is laid for them in other respects."

There is nothing in *Casco Bank v. Keene*, 53 Me. 103, in conflict with this. In that case, and upon its peculiar facts, it was held proper to instruct the jury, "that if the plaintiffs, relying on the defendant's admission, were induce to refrain from obtaining security from Judson by his arrest or by an attachment of his property, and they thereby sustained an injury, then the defendant would be estopped from denying his signature." But of course to justify such an instruction, there must be some evidence tending to show the facts upon which it is predicated.

In this case, the burden of proof to show that it sustained damage or injury by the negligence of plaintiff was upon the defendant, and this it was required to show by evidence having some reasonable tendency to establish such fact. In order to justify the submission of any question of fact to a jury, the proof must be sufficient to raise more than a mere conjecture or surmise that the fact is as alleged. It must be such that a rational, well-constructed mind can reasonably draw from it the conclusion that the fact exists, and when the evidence is not sufficient to justify such an inference, the court may properly refuse to submit the question to the jury; and in our opinion, the evidence in this case was not such as would have warranted the jury in finding as a fact that the delay of plaintiff in giving it notice that the check in question was a forgery lost to it any rights or remedies which otherwise it might have

resorted to in order to save itself from the loss incurred by its own mistake or negligence in the first instance, and which it now asks the plaintiff to bear, and therefore the error we have pointed out in the instruction of the court was without prejudice to the defendant.

Judgment and order affirmed.

PARSONS, J., dissented, on the ground that the question whether or not the defendant bank sustained loss by reason of the plaintiff's failure to earlier notify it of his discovery of the forgery should have been left to the jury. He said: "It seems to me that whatever may be said of the duty of a depositor to examine his checks promptly, it must be conceded that when he has discovered the fact that his signature has been forged, or is informed of circumstances which would put him upon inquiry as to the fact, it is his duty to report the matter immediately to the officers of the bank. If he has willfully withheld from the bank any information he may have had, he ought to be estopped from claiming that the bank could not have protected itself. Under the decision of the majority, it seems to me a dishonest depositor will be enabled, without peril to himself, to perpetrate a fraud upon the bank. If he discover that he has been negligent in examining his checks, he will, nevertheless, be entitled to recover, unless the bank can show that it was prejudiced by his negligence. Now, he will know that the longer he withholds notice of the forgery from the bank, the more difficult it will be for the bank to prove that it could have detected and arrested the forger, and therefore the easier it will be for him to recover. This, it seems to me, is putting a premium upon laches, and encouraging a dishonest depositor even to assist the forger in covering up his tracks. Although the plaintiff may have acted in the utmost good faith in attempting to detect the forger, still the jury should determine whether or not his long delay in giving notice of the forgery was to the prejudice of the defendant bank. The latter was entitled to immediate notice of plaintiff's discovery, and it does not follow that because plaintiff failed to detect the forger, the officers of the bank also would have failed to do so. The arrest and detention of a forger is often a strong and effectual means for the restoration of the money, and although it may be a difficult question to determine in certain cases whether the injured party has been deprived of or delayed in the exercise of this coercive power by the negligence of the depositor, it is for the jury, reasoning to practical results from all the circumstances, to say whether it is fairly probable that the defendant could and would have taken effective measures to protect itself"; *Continental Nat. Bank v. National Bank*, 50 N. Y. 575; *Voorhis v. Olmstead*, 66 N. Y. 113; *Leather Mfrs'. Bank v. Morgan*, 117 U. S. 115; *Hardy v. Chesapeake*, 51 Md. 562; 34 Am. Rep. 325; *Casco Bank v. Keene*, 53 Me. 103.

Judge Paterson then said in effect that the law would not presume that the defendant bank was prejudiced by the long delay and negligence of the plaintiff in failing to report the forgery to the bank after he detected it, but that the question as to whether or not the bank was so prejudiced should be left to the jury: *Dana v. National Bank*, 132 Mass. 156; and that the fact that the bank did not require the signature of the stranger to whom it paid the money, as well as that it took no steps to ascertain his identity, or to detect the forgery at any time, constantly insisting on the genuineness of the check, although it had evidence tending to show that a certain person was

the forger, should also be considered by the jury. "So, also, the fact that the plaintiff allowed long periods of time to elapse between the occasions when he presented his bank-book to be balanced, and that he frequently asked the teller of the bank for his balance instead of consulting his bank-book, that he neglected to examine the book with the return checks for several months after September 4, 1878, that he had expressed surprise at the smallness of the balance as shown by the books of the bank, and his failure to notify the bank until February, '1879, eight months after he began to doubt the genuineness of the check, are all matters to be considered by the jury in determining the questions at issue. The court cannot say, it seems to me, that as a matter of law under such circumstances the plaintiff is entitled to recover. I am unable to see any force in the suggestion that the officers of the bank took no steps at the time the check was paid to identify the person who presented it. Unless the paying teller has a suspicion as to the genuineness of the signature of a check payable to bearer, he is not called upon to make and preserve evidence as to such identity, and if such precautions had been taken in this case, that fact would have been conclusive evidence that the bank had notice of facts which put it upon inquiry. In such a case, of course the bank would have no defense, even if the depositor was guilty of negligence. It is said that there is no evidence from which it can be reasonably inferred that the plaintiff's delay prejudiced the defendant. But the inability of the defendant to produce such evidence may have been caused by the lapse of time between the time when plaintiff, acting as a prudent man, ought to have discovered and given notice of the forgery, and the time when such notice was in fact given. This is peculiarly a question for the jury, under proper instructions from the court."

**BANKS AND BANKING — RELATION BETWEEN BANK AND DEPOSITOR.** — A depositor when he makes a deposit becomes a creditor of the bank, and the latter becomes his debtor for the amount deposited: *Hawes v. Blackwell*, 107 N. C. 196; 22 Am. St. Rep. 870, and note; *Lynch v. First National Bank*, 107 N. Y. 179; 1 Am. St. Rep. 803; extended note to *National Bank v. Smith*, 23 Am. Rep. 50-52.

**BANKS AND BANKING — LIABILITY OF BANK FOR PAYING FORGED CHECK.** — Payments made by a bank upon forged indorsements are at its peril unless the depositor has been guilty of some negligence operating to the prejudice of the bank: *Shipman v. Bank*, 126 N. Y. 318; 22 Am. St. Rep. 821, and note; *First National Bank v. State Bank*, 22 Neb. 769; 3 Am. St. Rep. 294, and note; extended note to *People's Bank v. Franklin Bank*, 17 Am. St. Rep. 889. It is the duty of a depositor to know whether his account with the bank is correct or not, and promptly to report a forgery; if he negligently fails to make the examination and consequent discovery when he could have done so, it is as if he had admitted the genuineness of the checks, and he will not be permitted to deny the fact if the bank is prejudiced by the failure: *Weinstein v. National Bank*, 69 Tex. 38; 5 Am. St. Rep. 23, and note.

[IN BANK.]

ARROYO DITCH AND WATER CO. v. SUPERIOR COURT.

[92 CALIFORNIA, 47.]

**JURISDICTION OF SUPERIOR AND JUSTICE'S COURTS TO ENFORCE ASSESSMENTS ON STOCK BY CORPORATION.** — The term "assessment," as used in the California constitution conferring jurisdiction upon the superior court in cases at law involving the legality of any tax, impost, assessment, toll, or municipal fine, refers to such assessments as are authorized in relation to revenue and taxation, and such as may be made by authority of a municipal or other public corporation to meet the cost of a public improvement; and does not include "assessments" or "calls" made by a private corporation upon its stockholders pursuant to contract, express or implied. The justices' courts have jurisdiction of questions involving the legality of such "assessments" or "calls," where the amount in dispute is less than three hundred dollars.

**JURISDICTION OF JUSTICE'S COURT — VOID ATTEMPT TO TRANSFER JURISDICTION.** — A justice's court has full jurisdiction to determine all questions as to the validity of an "assessment" or "call" made by a private corporation on its stock, when the court has jurisdiction of the amount in dispute, and it has no authority, before trial, to divest itself of jurisdiction by certifying the pleadings to a superior court which has no jurisdiction. The determination of the justice thus seeking to divest himself of jurisdiction has no conclusive effect as a judgment.

**ORIGINAL JURISDICTION OF SUPERIOR COURT.** — The superior court can exercise its original jurisdiction only in those cases provided by the constitution, and its appellate jurisdiction only in such cases as may be prescribed by law. It cannot exercise original jurisdiction in those matters in which its jurisdiction is appellate only, nor can it exercise jurisdiction in any instance until it has acquired it in the mode prescribed by the constitution or statutes.

**JURISDICTION OF SUPERIOR COURT — PRESUMPTION.** — Although the exercise of jurisdiction by the superior court will be presumed to have been rightful, yet if it appears upon its record of its action in any matter that it had not acquired jurisdiction either of the subject-matter or of the parties, this presumption is destroyed.

**JURISDICTION — IRREGULAR TRANSFER OF BY JUSTICE, AND ASSUMPTION OF BY SUPERIOR COURT.** — The mere filing of pleadings with the county clerk, certified by a justice of the peace in a case pending before him, and before trial, does not confer jurisdiction upon the superior court of a matter of which jurisdiction has not been conferred upon it by the constitution, nor does it acquire jurisdiction in such case by subsequently determining that it has jurisdiction, and by proceeding to trial, and rendering judgment therein.

**JURISDICTION — ATTACK ON, AFTER TRIAL, UNDER OBJECTION.** — The fact that a litigant, after his objection to the jurisdiction of the superior court has been overruled in a case improperly transferred to it from a justice's court, proceeds, under such objection, to try the case, does not preclude him from subsequently attacking the jurisdiction of the superior court to proceed in the matter.

*Holloway and Kendrick*, for the petitioner.

*Robinson, Willis, and Appel*, for the respondent.

**HARRISON, J.** The plaintiff, a private corporation, brought an action against one E. J. Standlee, in the justice's court for Downey township, in Los Angeles County, upon a promissory note for twenty-one dollars, executed to it by him. The defendant filed a verified answer to the complaint, alleging that the sole consideration for which the note had been given was a pretended assessment by the plaintiff upon its capital stock (of which he held a certain number of shares), and that the said assessment was illegal and void. Upon filing the answer, the defendant moved the court to transfer the action to the superior court, upon the ground that it necessarily involved the question of the legality of an assessment, and thereupon the court suspended all further proceedings in the action, and certified the pleadings to the county clerk of Los Angeles County. After the pleadings had been filed with the county clerk, the plaintiff moved the superior court to remand the cause to the justice's court, upon the ground that that court erred in transferring the cause to the superior court, and that the superior court had no jurisdiction of the matter. This motion was denied, and the court thereafter tried the cause, and rendered a judgment in favor of the defendant. At the instance of the plaintiff, a writ of review was issued out of this court to the superior court, and in obedience thereto a transcript of the records and proceedings of that court in the matter has been certified to this court.

The constitution, article 6, section 5, declares that "the superior court shall have original jurisdiction . . . . in all cases at law which involve the . . . . legality of any tax, impost, assessment, toll, or municipal fine." The term "assessment," used in this provision, does not include the installments or "calls," which are sometimes termed assessments, made under the provisions of section 331 of the Civil Code, by a private corporation upon its stockholders in accordance with an agreement on their part, express or implied, to pay into its treasury the amount subscribed by them to its capital stock. It has reference to such assessments as are authorized by those provisions of the constitution which relate to revenue and taxation, and to such as may be made under the authority of a municipal or other public corporation for the purpose of meeting the cost or expense of some public improvement: *Taylor v. Palmer*, 31 Cal. 241. The other words in the clause, in connection with which the term is associated, serve to illustrate its meaning, and resolve any doubt that might otherwise be

raised respecting the sense in which it is to be interpreted. Each of these subjects, viz., tax, impost, toll, municipal fine, of which jurisdiction is thus conferred upon the superior court, implies a charge imposed by public authority for some public purpose, and under the rules by which the maxim, *Noscitur a sociis*, is applied, it is clear that the "assessment" referred to is of a kindred nature. Inasmuch, therefore, as the constitution has not conferred upon the superior court any original jurisdiction to determine the legality of the assessment alleged in the answer of the defendant, it follows that the justice's court had full jurisdiction to determine all questions relating to such assessment that might be presented upon the trial of the cause, and had no authority to certify the pleadings to the superior court.

The proposition of the respondent, that the determination of this question by the justice was conclusive, cannot be maintained. While a justice of the peace has jurisdiction to pass upon any question of fact or of law which is involved in the trial of an issue properly before him, so that his judgment in the cause will be binding upon the parties in the absence of any appeal or review, yet he has not the jurisdiction in this summary mode to divest himself of jurisdiction, or to transfer a cause which is within his jurisdiction to a tribunal which has no jurisdiction to determine it. If in the present case he had tried the cause, and rendered judgment therein for the defendant, upon the ground that the justice's court had no jurisdiction to determine the subject-matter presented by the defense, or to try the cause, an appeal could have been taken from that judgment to the superior court, and the superior court would then have had the power, under its appellate jurisdiction, to pass definitively upon the question. He could not, however, determine the question in advance of trying the cause, and give to such determination the effect of a judgment.

Nor did the superior court acquire jurisdiction of the cause by the fact that the justice had certified the pleadings to the county clerk. The constitution has given to it original and appellate jurisdiction, but it can exercise its original jurisdiction only in those cases provided by the constitution, and its appellate jurisdiction only in such cases as may be prescribed by law. It cannot exercise original jurisdiction in those matters in which its jurisdiction is only appellate. The jurisdiction that it exercises under the provisions of section 838 of the Code of Civil Procedure is original, and not appellate, and the



provision in that section, that "from the time of filing such such pleadings or transcript with the clerk, the superior court shall have over the action the same jurisdiction as if it had been commenced therein," implies that if it would have had no jurisdiction over the action if it had been commenced therein, it can have no jurisdiction by the filing of the pleadings certified by the justice.

Although the exercise of jurisdiction by the superior court will be presumed to have been rightful, yet if it appears upon its own records of its action in any matter that it had not acquired jurisdiction either of the subject-matter or of the parties, this presumption is destroyed. It cannot exercise jurisdiction in any instance until after it has acquired it, and it can acquire it only in the mode prescribed by statute. Merely certifying to the county clerk by a justice of the peace the pleadings in a case pending before him does not confer jurisdiction upon the superior court of a matter of which jurisdiction has not been conferred upon it by the constitution. Nor does it acquire jurisdiction of the parties to that cause by thereafter determining that it has jurisdiction, and by proceeding in the trial of the cause, and rendering judgment therein. The fact that a party, after his objection to the jurisdiction of a court has been overruled, proceeds under such objection to try the cause does not preclude him from thereafter questioning the power of the court to take any steps in the matter: *Lyman v. Milton*, 44 Cal. 630; *Harkness v. Hyde*, 98 U. S. 479.

If the court never acquired jurisdiction over him, it does not acquire it because he may have chanced to be in the court-room when the case was called for trial, and while protesting against the trial, endeavors to protect his rights against the claims of his adversary. "The jurisdiction of the superior court under section 838 was special, and that court could hear and determine the cause only after the pleadings before the justice were filed with its clerk. The superior court had jurisdiction only because the pleadings had before the justice and filed with its clerk presented the issue of the legality or validity of the tax or impost, and could then take jurisdiction only for the purpose of trying the issue as to the legality of the tax or impost; since, the amount being less than three hundred dollars, the justice's court had jurisdiction to pass upon every other issue": *Santa Cruz v. Santa Cruz R. R. Co.*, 56 Cal. 147.

Inasmuch as the only mode in which it is claimed that the



superior court acquired any jurisdiction of the action brought by the plaintiff against Standlee was from the act of the justice of the peace in certifying the pleadings therein to the county clerk, and as we have seen that such act was unauthorized, it follows that the action was never legally before the superior court for determination, and that it was without any jurisdiction to render a judgment in the case.

It is therefore ordered that the judgment of the superior court, and all orders and proceedings by it taken in the case, be and they are hereby annulled.

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**JURISDICTION — STOCKHOLDER'S LIABILITY — ENFORCEMENT OF.** — In an action to enforce the liability of a stockholder in a corporation, where the amount is less than three hundred dollars, the superior court has no jurisdiction: *Hyman v. Coleman*, 82 Cal. 650; 16 Am. St. Rep. 178.

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[IN BANK.]

**DAGGETT v. COLGAN.**

[92 CALIFORNIA, 53.]

**CONSTITUTIONAL LAW — APPROPRIATION FOR "WORLD'S FAIR."** — A statute appropriating money to meet the expenses of erecting buildings and maintaining an exhibit of the products of the state of California at the World's Fair Columbian Exposition at Chicago, and providing that such appropriation is to be expended and disbursed under the exclusive charge and control of a commission to be appointed by the governor of the state, is valid as making an appropriation for a public use, and is not in conflict with a constitutional provision forbidding the appropriation of state money to any institution not under the exclusive management and control of the state, as a state institution.

**CONSTITUTIONAL LAW — APPROPRIATIONS — LEGISLATIVE DISCRETION.** — In making appropriations of state money for public purposes or for the public good, the state legislature is not limited by necessity alone; and in determining the question, it is vested with a large discretion, which cannot be controlled by the courts, except, perhaps, when its action is clearly evasive.

**CONSTITUTIONAL LAW — APPROPRIATION TO CELEBRATE ANNIVERSARY.** — The state, under its general authority to provide for the public welfare, unless restrained by its constitution, may make appropriations to celebrate important events in the history of the country, and may confer such power upon municipal corporations.

*E. W. McKinstry*, for the petitioners.

*W. H. H. Hart*, attorney-general, *amicus curiæ*.

*Barham and Bolton*, and *William R. Davis*, for the respondent.

DE HAVEN, J. This is an original application to this court for a writ of mandate to compel the defendant, as controller, to draw his warrant on the state treasurer, in payment of a claim contracted and audited by the petitioners as members of the California World's Fair Commission, in pursuance of the authority given such commission by an act of the legislature of this state, approved March 6, 1891: Stats. 1891, p. 24.

The act provides for the appointment, by the governor, of a commission, who "shall have the exclusive charge and control of the expenditure of all moneys appropriated by the state of California for the construction of buildings and maintaining an exhibit of the products of the state of California at the World's Fair Columbian Exposition, to be held in the city of Chicago, state of Illinois, in eighteen hundred and ninety-three." By section 3 of the act, the sum of three hundred thousand dollars is appropriated "to meet the expenses of erecting buildings and maintaining an exhibit of the products of the state of California at the World's Fair Columbian Exposition" at Chicago, and the controller is directed to draw his warrant on the treasury from time to time in favor of such persons as the majority of the commissioners provided for by the act shall direct.

The defendant demurs to the petition, upon the general ground that the facts therein stated do not entitle petitioners to the writ demanded, and in support of this demurrer contends, —

1. That the act of the legislature referred to is in conflict with that provision of section 22 of article 4 of the constitution which declares that "no money shall ever be appropriated or drawn from the state treasury for the use or benefit of any corporation, association, asylum, hospital, or any other institution not under the exclusive management and control of the state as a state institution, nor shall any grant or donation of property ever be made thereto by the state."

In considering the question thus presented, the court will take judicial notice of the fact that the World's Fair Columbian Exposition, referred to in the statute under consideration, is to be held under and by virtue of the provisions of an act of Congress approved April 25, 1890 (27 U. S. Stats. at Large, 62), and that such exposition will not be conducted under the exclusive management and control of this state as a state institution, but on the contrary, that the same will be under the general management of the national commission

created by that act; and that the chief agency relied upon to effect the design of Congress is a private corporation of the state of Illinois, which is authorized by the act of Congress to charge such entrance and admission fee to such exhibition "as shall be fixed and established by said corporation, subject, however, to such modification, if any, as may be imposed by a majority of said commissioners."

But while conceding these to be the facts, unless the act under consideration makes an appropriation for the use and benefit of the national commission, or in aid of a private corporation, through the instrumentality of which the exposition is in great part to be conducted, and from the success of which that corporation expects to derive a pecuniary profit, it is clear that the provision of the constitution above quoted, and relied upon by defendant, can have no application. It is claimed by the defendant that the statute under consideration does, in effect, make such an appropriation, but we are not able to find anything in its language which would justify the contention of defendant on this point. On the contrary, it appears from the act itself, that the appropriation is to be expended by the state itself, disbursed by its own agents or officers, and is to be used only for the purpose of "erecting buildings and collecting and maintaining an exhibit of the products of the state of California."

Even if it could be said with any degree of certainty that the private corporation referred to in the act of Congress will increase its receipts because of the fact that the state is to place its products on exhibition, or that it may derive a benefit from the rent of its grounds to the state, or realize other profits, still, this would not affect the question we are considering, or bring the appropriation within the prohibition of the section of the constitution above quoted, as it is apparent that the main object of the statute is not to confer such incidental benefit, but rather to promote what is assumed to be a matter of public concern, and for the public good. In every public expenditure, individuals derive incidental aid and benefit, in the sense that they are paid for services rendered, or articles furnished to the state in the prosecution of the public improvement or business of the state, and the expenditure contemplated by this act will not be exceptional in this respect; but there is nothing upon the face of the statute to indicate that the private corporation referred to, or any individual, will or can, if the appropriation is honestly expended, receive one

dollar as a gratuity or by way of assistance, or except in return for something of value which the officers charged with its disbursement shall deem necessary to secure in order to effect the general purpose and object of the act.

2. The defendant further contends that the statute is unconstitutional, for the reason that the appropriation thereby made is not for a public use, such as the state is authorized to make; that the maintenance of an exhibition of the products of the state in the manner contemplated does not fall within the legitimate authority of the state government.

In passing upon this proposition, it is necessary to bear in mind that what is for the public good, and what are public purposes, "are questions which the legislature must decide upon its own judgment, in respect to which it is vested with a large discretion which cannot be controlled by the courts, except, perhaps, where its action is clearly evasive. . . . Where the power which is exercised is legislative in its character, the courts can enforce only those limitations which the constitution imposes; not those implied restrictions which, resting in theory only, the people have been satisfied to leave to the judgment, patriotism, and sense of justice of their representatives": Cooley's Constitutional Limitations, 154.

It is undoubtedly true that public money can be rightfully expended only for public purposes, but as was well said by that eminent jurist, Judge Cooley, in delivering the opinion of the court in *People v. Salem*, 20 Mich. 452, 4 Am. Rep. 400: "Necessity alone is not the test by which the limits of state authority in this direction are to be defined, but a wise statesmanship must look beyond the expenditures which are absolutely needful to the continued existence of organized government, and embrace others which may tend to make that government subserve the general well-being of society, and advance the present and prospective happiness and prosperity of the people."

In view of these principles of constitutional law, which are so well settled as to be placed beyond discussion or dispute, it is manifest, we think, that the court is not authorized to declare the act under consideration void, upon the theory that the expenditure thereby authorized can in no manner be considered as tending to promote the public welfare, which it is one great object of government to secure. The question whether the public interests of the state would be at all advanced by an exhibition of its products such as is contem-

plated by the act was an appropriate one for discussion in the halls of the legislature before its enactment, and for the consideration of the governor before approving it, but it is not one for this court to decide, upon the individual views of its members concerning the wisdom or expediency of such legislation.

There is no difference, except in degree, between the appropriation contained in this act and those which for years have been made without any question as to their validity, for the support of the state agricultural fair, and the various district agricultural societies throughout the state. The fact that this exhibit of the products of the state is to be made without the limits of the state does not change its essential character, or make it any less an occasion or purpose in which, in an enlarged sense, it may be said that the people of the state have an interest. So, also, it would be hard to distinguish this appropriation in principle from those appropriations which have been made from time to time for the maintenance of horticultural, viticultural, and other similar commissions. None of these, strictly speaking, are required for the proper administration of the government of the state, and possibly, in the opinion of many, call for an unjustifiable and useless expenditure of money. But the power of the legislature to create such commissions has never been doubted.

We know from the express declaration of the act of Congress authorizing the Columbian Exposition that the purpose of the exposition is to commemorate the four hundredth anniversary of the discovery of America, "by an exhibition of the resources of the United States of America, their development, and of the progress of civilization in the New World"; and that such exhibition is to be of a "national and international character, so that not only the people of the Union and of this continent, but those of all nations as well, can participate."

We have no doubt that it was fairly a matter within the power of the legislature to determine whether, as a matter of public policy and as tending to advance the best interests of its citizens, this state should join with its sister states, and with the government of the United States, in celebrating in the way suggested the historical event referred to.

It has been held in many cases that a municipal corporation has no authority, under the general powers usually given such corporations, to appropriate money for the celebration of the anniversary of important events in the history of our country,

such as the Fourth of July: *Hodges v. Buffalo*, 2 Denio, 110; *Hood v. Lynn*, 1 Allen, 103; and the surrender of Cornwallis: *Tash v. Adams*, 10 Cush. 252. See also The Liberty Bill, 23 Fed. Rep. 844.

These decisions, however, all rest upon the principle that municipal corporations have no powers except such as are specifically granted by the act of incorporation, or are necessary for the purpose of carrying into effect the powers expressly granted. But it has never been doubted that the state could confer upon a city or town the authority to celebrate such important events in the history of the country as appeal to the patriotism or higher sentiments of the people, and to tax their citizens to pay the expense thereof. Thus it was held that the city of Philadelphia had the power, under its charter, to provide for the entertainment of distinguished visitors upon the occasion of the celebration of the Centennial Anniversary of American Independence: *Tatham v. Philadelphia*, 11 Phila. 276. So, also, in Massachusetts, by general statutes, the power has been conferred upon towns to celebrate the centennial anniversary of their incorporation: *Hill v. East Hampton*, 140 Mass. 381; and also to appropriate money for the celebration of holidays, and for other public purposes: *Hubbard v. Taunton*, 140 Mass. 467.

These cases are authority for the proposition that the state itself, unless restrained by its constitution, has the power to make appropriations for such purposes, because, unless it possesses the power, it could not confer it upon its municipal corporations. Such expenditures are justified under the general power which the state has to provide for the public welfare,—the limits of which are perhaps not capable of exact definition,—and are the same in principle as appropriations made for the building of monuments to commemorate great historical events, or for the erection in public places of the statues of those who by common consent are classed among the patriots or benefactors of the nation.

Undoubtedly this power may be the subject of great abuse, but this is no argument against its existence. The only protection against reckless and improvident appropriations for public purposes must be found in the character of those intrusted with the power of legislation, and in the integrity and firmness of the chief executive of the state.

The demurrer of defendant is overruled, and a peremptory

writ of mandamus ordered in accordance with the prayer of petitioners.

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APPROPRIATIONS — WHAT ARE, AND VALIDITY OF: See *Carr v. State*, 127 Ind. 204; 22 Am. St. Rep. 624, and extended note at page 622.

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## SANBORN v. DON.

[92 CALIFORNIA, 152.]

### ASSIGNMENT OF RIGHT TO COMPLAIN OF FRAUD IN INSOLVENCY PROCEEDINGS.

— One who is not a creditor of an insolvent at the time that the latter receives his decree of discharge in insolvency cannot, by subsequently purchasing creditors' claims affected by such decree, acquire any right to attack it for fraud, as the right of creditors to set aside such decree for fraud is not subject to transfer, either by direct assignment or as an incident to the assignment of claims affected by it.

ASSIGNMENT OF RIGHT TO COMPLAIN OF FRAUD committed on the assignor is contrary to public policy and void.

*A. E. Bolton, T. L. Carothers, and J. A. Barham, for the appellant.*

*J. A. Cooper, for the respondent.*

DE HAVEN, J. The defendants were copartners on November 11, 1886, and on that day filed in the superior court of Mendocino County their petition in insolvency, and such proceedings were had therein that on May 4, 1887, the court duly made and entered its decree discharging them from all their debts and liabilities. The plaintiff was not at that date a creditor of either of said defendants, but thereafter several of those who were such creditors, and whose claims were discharged by said decree, assigned their claims to plaintiff, and he thereupon commenced this action to set aside the said order or decree of discharge, upon the alleged ground that certain creditors were improperly influenced not to oppose the same, and that therefore the said decree was fraudulent.

A demurrer to the complaint was sustained, and judgment thereupon rendered in favor of defendants. The plaintiff appeals.

The demurrer was properly sustained. Section 53 of the Insolvent Act of 1880, provides: "Any creditor of said debtor, whose debt was proved or provable against the estate in insolvency, who shall see fit to contest the validity of such discharge on the ground that it was fraudulently obtained, and



who has discovered the facts constituting the fraud subsequent to the discharge, may, at any time within two years after the date thereof, apply to the court which granted it to set aside and annul the same; or if the same shall have been pleaded, the effect thereof may be avoided collaterally upon any such grounds."

The plaintiff was not a creditor of defendants, having a debt which "was proved or provable" against their estate in insolvency at the date of the rendition of the judgment which he now seeks to set aside; and not being such a creditor, he is not one of the persons authorized to maintain such an action by the section of the insolvent act just quoted. And independently of the statute, the complaint fails to state facts sufficient to entitle plaintiff to the relief which he asks. Not being a creditor of defendants when the decree of discharge in the insolvency proceeding was given and made, the plaintiff was not in any way injured by it, and had no right to complain of it, and he did not acquire such right by his subsequent purchase of the claims referred to in the complaint. It is true, the assignors of plaintiff would, upon the facts alleged, have the right to set aside the decree referred to, but this right was not the subject of transfer, either by direct assignment or as an incident to the assignment of the claims which were affected by the decree of discharge: *Dickinson v. Seaver*, 44 Mich. 631; *Milwaukee etc. R. R. Co. v. Milwaukee etc. R. R. Co.*, 20 Wis. 183; 88 Am. Dec. 740; *Carroll v. Potter*, Walk. Ch. 355; 3 Pomeroy's Eq. Jur., sec. 1276.

In *Dickinson v. Seaver*, 44 Mich. 631, the supreme court of Michigan, in passing upon a state of facts not in principle different from those alleged in this complaint, say: "The present complainant, according to his own proofs, has merely purchased claims for the purpose of this litigation or of some litigation. He was never defrauded. It would be against every rule of equity to allow a party to buy up stale claims and then seek to establish fraud committed against his assignors. A right to complain of fraud is not assignable, and the claims in controversy have nothing involved which could keep them alive, unless fraud would do so. Being nothing more than an assignment of an action for fraud, it is well settled that it will not be enforced."

The same rule was recognized by this court in *Cross v. Sacramento Savings Bank*, 66 Cal. 462, in which case it was said, quoting with approval from section 1040 of Story's



**Equity Jurisprudence:** "An assignment of a bare right to file a bill in equity for a fraud committed on the assignor will be held void, as contrary to sound policy."

It follows from these views that the judgment appealed from must be affirmed. So long as the decree discharging the defendants from their debts and liabilities remains in force, the claims assigned to plaintiff can have no validity; and as he did not by such assignment acquire the right to attack or set aside that decree, he really took nothing by such assignment, and has no cause of action against defendants.

Judgment affirmed.

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**ASSIGNMENT OF RIGHT TO FILE A BILL FOR FRAUD.** — The right to file a bill to set aside an instrument for fraud committed upon the assignor is not assignable: *Milwaukee etc. R. R. Co. v. Milwaukee etc. R. R. Co.*, 20 Wis. 174; 33 Am. Dec. 740, and note; *Marshall v. Means*, 12 Ga. 61; 56 Am. Dec. 444, and extended note; *Whitney v. Kelley*, 94 Cal. 146; 28 Am. St. Rep. The assignment of a note secured by a trust deed or mortgage does not entitle the assignee to maintain an action for the conversion of part of the chattels covered by such deed or mortgage, if such conversion preceded the assignment: *Gibbert v. Wallace*, 66 Miss. 618.

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[IN BANK.]

## PEOPLE v. AH LEN.

[92 CALIFORNIA, 232.]

**NEW TRIAL IN CRIMINAL CASES — STATEMENT AND COMMENT BY COUNSEL AS TO FACTS NOT IN EVIDENCE.** — Where, on the trial of a criminal case, counsel for the prosecution is permitted, in the presence of the jury, to state facts not in evidence, imputing a violent character to the accused, and to comment upon them in argument to his prejudice, he is entitled to a new trial, although the jury is instructed to disregard all statements and comments of counsel as to any matter not in evidence.

*O. C. Stephens and J. A. Donnell*, for the appellants.

*W. H. H. Hart*, attorney-general, for the respondent.

**DE HAVEN, J.** The appellants were charged by information with the crime of murder, alleged to have been committed on one Fong Ah Lung, in the county of Los Angeles, and were convicted of murder in the second degree. This appeal is from the judgment, and an order denying their motion for a new trial.

During the progress of the trial, Mr. Ling, one of the attorneys conducting the case in behalf of the people, stated to the

court in the presence of the jury: "I would like to have the court direct the defendants to forbid them making threats against Charley Ah Him as he sits here assisting the prosecution of this case. Now, this is the second time that it has been done, and I would like to have the court put a stop to it. . . . Two or three of the defendants have said here just this instant, 'Now you look out what you are doing; you look, or we will fix you.'" The court immediately directed the jury to "pay no attention whatever to remarks made by counsel," and the trial proceeded.

Upon the close of the evidence, the same attorney made the opening address to the jury, and during the course of his argument, "he remarked to the jury that the violence of these defendants in killing Fong Ah Lung was exemplified here in this court-room; that during the trial of the case they could n't keep their mouths shut, but threatened him or his assistant, Charley Ah Him, by making threats in the court-room." To this appellants objected, on the ground that it was not warranted or justified by any evidence in the case, and the following proceedings were had:—

"*The Court.* — The court will instruct the counsel for the prosecution to abstain from making any remarks upon any matter not shown by the evidence, and will instruct the jury to pay no attention whatever to any statement of fact which is not warranted by the evidence; that the only matter before them for their consideration is the evidence, and they are not to take into consideration any statement of counsel with reference to any matter of fact which is not shown by the evidence. Proceed with the argument.

"*Mr. Ling.* — It is just what I expected.

"*Mr. Stephens.* — Just a moment.

"*Mr. Ling.* — I expected when the facts came out the galled jade would wince."

The learned judge of the court below did everything in his power to dislodge from the minds of the jurors any impression which the statements referred to may have made, but we do not think the error committed against appellants was thereby removed from the case. There was no withdrawal of the facts so stated, but on the contrary, after the court had directed the jury to disregard them, the counsel who made the statement, in effect, again reiterated its truth by the assertion, "I expected when the facts came out the galled jade would wince."

A person accused of crime is entitled, under the constitution, to a trial by jury, conducted according to the established principles of law, not the least important of which is, that the verdict shall be founded only upon relevant and competent facts produced before the jury under the rules prescribed for the admission of evidence; and it was held by the supreme court of New Hampshire, in the leading and well-considered case of *Tucker v. Henniker*, 41 N. H. 317, that this right is violated "if counsel are permitted to state facts, and comment upon them in argument against the adverse party, which are not before the jury by proofs regularly submitted." It is true that the attorney for the prosecution in this case was not permitted by the court to comment at any length upon the facts which he himself imported into the case; but while this was to the credit of the court, it does not change the fact that a matter not in evidence, and of a nature clearly prejudicial to the appellants, was laid before the jury for the purpose of affecting their verdict, and it is no answer to this to say that the jury may have disregarded it. As was said in the case just cited: "When counsel are permitted to state facts in argument, and to comment upon them, the usage of courts regulating trials is departed from, the laws of evidence are violated, and the full benefit of trial by jury is denied. It may be said, in answer to these views, that the statements of counsel are not evidence, that the court is bound to so instruct the jury, and that they are sworn to render their verdict only according to evidence. All this is true; yet the necessary effect is to bring the statements of counsel to bear upon the verdict with more or less force, according to circumstances; and if they, in the slightest degree, influence the finding, the law is violated, and the purity and impartiality of the trial tarnished and weakened. If not evidence, then manifestly the jury have nothing to do with them, and the advocate has no right to make them. It is unreasonable to believe the jury will entirely disregard them. They may struggle to disregard them; they may think they have done so, and still be led involuntarily to shape their verdict under their influence."

It follows that the only safe and just rule to apply in such cases is to make it impossible for a party to derive any advantage from such misconduct of counsel, by promptly granting a new trial to the adverse party, unless it is clear that the verdict was not affected thereby. It may be added that if the fact stated by counsel had been introduced in evidence

against the objection of appellants, it would have been sufficient to reverse the judgment, as the fact is itself an irrelevant one. It had no legitimate tendency to prove any issue in the case, but it was one which, as urged by counsel for the prosecution, was well calculated to illustrate "the violence" of appellants, and this was doubtless the object of bringing it to the attention of the jury; but the character of a defendant on trial for murder is not subject to this kind of attack.

Judgment and order reversed.

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**CRIMINAL LAW — APPEAL AND ERROR — IMPROPER COMMENT OF COUNSEL AS GROUND FOR REVERSAL.** — Intemperate comments by counsel not warranted by the evidence will constitute grounds for a new trial, where the conduct of counsel was not checked by the court: *People v. Aiken*, 66 Mich. 460; 11 Am. St. Rep. 512, and note; *Nalley v. State*, 28 Tex. App. 387.

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[IN BANK.]

## IN RE MADERA IRRIGATION DISTRICT.

[92 CALIFORNIA, 296.]

**CONSTITUTIONAL LAW — IRRIGATION DISTRICTS.** — The statute of California, approved March 7, 1887, providing for the organization and government of irrigation districts, and regulating the mode for assessments upon the lands therein with which to meet the bonds authorized by the act, is constitutional and valid.

**CONSTITUTIONAL LAW — EXTENT OF LEGISLATIVE POWER.** — The legislature is vested with the whole of the legislative power of the state, and has authority to deal with any subject within the scope of civil government, except in so far as it is restrained by constitutional provisions. It is the sole tribunal to determine the expediency as well as the details of all legislation.

**CONSTITUTIONAL LAW — PRESUMPTION AS TO LEGISLATIVE POWER.** — The presumption is, that every legislative act is within the power of the legislature, and he who would except it from the power must point out the particular provision of the constitution by which the exception is made, or demonstrate that it is palpably excluded from any consideration whatever by that body.

**CONSTITUTIONAL LAW — EXTENT OF LEGISLATIVE POWER.** — The legislature, when not restrained by constitutional provisions, may pass laws affecting a limited portion as well as the entire people of the state. It may make special laws relating only to special districts, or it may legislate directly upon local districts, or it may intrust such legislation to subordinate bodies of a public character in existence or specially created by it for that purpose.

**CONSTITUTIONAL LAW — DOUBTFUL LEGISLATION — POWER OF JUDICIARY.** — In providing for the public welfare, or in enacting laws which in the judgment of the legislature may be expedient or necessary, that body

must determine whether or not the measure proposed is for some public purpose. Although a declaration by the legislature that an act proposed by it will be for the public good will not of necessity preclude a judicial investigation therein, nor be conclusive when the act itself is palpably otherwise; still, if the subject-matter is of such nature that there is any doubt of its character, or if by any possibility the legislation may be for the welfare of the public, the will of the legislature must prevail over the doubts of the court.

**CONSTITUTIONAL LAW — LEGISLATION CONFERRING INCIDENTAL ADVANTAGES UPON INDIVIDUALS.** — Whenever it is apparent from the scope of a statute that its object is for the benefit of the public, and that the means by which the benefit is to be attained are of a public character, the act will be upheld, even though incidental advantages may accrue to individuals beyond those enjoyed by the general public.

**CONSTITUTIONAL LAW — PUBLIC WELFARE — EXTENT OF LEGISLATIVE DISCRETION.** — The legislature, in attempting to promote the general welfare of the state, and to provide for the material prosperity of its people, may determine the manner and extent to which it will exercise this function of the government, and its determination is limited only by its own discretion, and is beyond the interference of the courts.

**CONSTITUTIONAL LAW — LEGISLATION FOR LOCAL IMPROVEMENT.** — A statute authorizing an expenditure for a local improvement is a legislative declaration that such expenditure is for a public purpose and for the public welfare, and such action is not to be disregarded by the courts upon an assumption by them that such legislation is unwise, or that it may be injurious to some of the individuals who are affected by it.

**CONSTITUTIONAL LAW — LEGISLATION FOR LOCAL IMPROVEMENT — IRRIGATION.** — In determining whether any particular statute, as for the irrigation of arid lands, is for the public advantage, it is not necessary to show that the entire body of the state is directly affected thereby, but it is sufficient that the portion of the state within the district provided for by the act shall be benefited thereby.

**CONSTITUTIONAL LAW — LEGISLATION FOR LOCAL IMPROVEMENT.** — Whatever legislation tends to an increased prosperity of one portion of the state, or to promote its material development, is for the advantage of the whole state. The right of the legislature to provide for developing the productive capacity of the state, or for increasing facilities for the cultivation of its soil, either by irrigation or drainage, according to the requirements of the different portions thereof, is upheld by its power to act for the public welfare, and particularly of that portion of the public within the district affected by the means adopted for such reclamation.

**CONSTITUTIONAL LAW — LEGISLATION FOR LOCAL IMPROVEMENT — TAXATION.** — The legislature may provide for a local public improvement for the benefit of a portion of the state, as an irrigation district, and may tax all land within such district, although some of it will receive no benefit, while some land adjacent to and outside the district will be incidentally benefited though not taxed.

**CONSTITUTIONAL LAW — LEGISLATION CREATING PUBLIC CORPORATIONS.** — The legislature may by general laws authorize the inhabitants of any district, under such restrictions and with such preliminary steps as it may deem proper, to organize themselves into a public corporation for the purpose of exercising governmental duties, and such corporations are not required to be formed in the same manner, nor provided with the

same powers, as other public or municipal corporations of a different class.

**CONSTITUTIONAL LAW — GENERAL LAWS OF LOCAL APPLICATION.** — The legislature may enact general laws which, from their nature, will be capable of enforcement in particular portions of the state only; or it may by other general laws authorize the organization of municipal corporations which, from the nature of the functions intrusted to them, can find occasion for organization in certain portions of the state only; and it may by such general laws provide for the organization of such or as many species of municipal corporations as, in its judgment, are demanded by the public welfare of the state and its people.

**CONSTITUTIONAL LAW — LEGISLATION CREATING PUBLIC CORPORATIONS — POWERS CONFERRED.** — The legislature is authorized, under its general power of legislation, to invest public corporations, when created by it, with the same powers it could itself have exercised; and in providing for such organizations, it need confer upon them only such powers, as in its judgment are proper to be exercised by them in the discharge of the particular functions of government which may be conferred upon them.

**CONSTITUTIONAL LAW — LEGISLATION CREATING PUBLIC CORPORATIONS UNDER GENERAL LAWS.** — The general laws which the legislature may enact for the creation and organization of public corporations may be as numerous as the objects for which such corporations may be created, and as they are only the representatives or agents of the legislature in the various localities of the state, the requirements for organization may vary with the character of the purpose for which they may be created.

**CONSTITUTIONAL LAW — GENERAL LAW OF LOCAL APPLICATION — IRRIGATION DISTRICT.** — Whenever a special district of the state requires special legislation therefor, as for irrigation purposes, the legislature may, by general law, authorize the organization of such district into a public corporation, with such powers of government as it may choose to confer upon it which are peculiarly appropriate to such an organization. It is no valid objection to such law that there is but a single district to which it is applicable at the time of its enactment.

**CONSTITUTIONAL LAW — LEGISLATION AUTHORIZING CREATION OF IRRIGATION DISTRICT — ACCEPTANCE.** — It is no objection to a general law authorizing the creation of a public corporation for district irrigation purposes, that such corporation cannot be created until the terms of the law have been accepted by the affirmative vote of the citizens of the district to be affected.

**CONSTITUTIONAL LAW. — MUNICIPAL CORPORATIONS WHICH MAY BE CREATED BY GENERAL LAWS** are not limited to towns and cities, but the legislature may authorize the formation of such corporations for any public purpose whatever.

**CONSTITUTIONAL LAW — STATUTE AUTHORIZING CREATION OF IRRIGATION DISTRICT.** — The mode in which a public corporation for district irrigation purposes may be formed under a general law is within the discretion of the legislature, and cannot be questioned by the courts. It is no valid objection to the law that the organization of the corporation may be compelled by parties within the district not the owners of the land affected thereby, or that no provision is made for a hearing from the owners of such land before the district is organized.

**CONSTITUTIONAL LAW — DUE PROCESS OF LAW.** — A land-owner is not deprived of his property without due process of law, when he is allowed a

bearing at any time before the lien of an assessment thereon becomes final.

**CONSTITUTIONAL LAW — POWER OF TAXATION.** — The power of the legislature in matters of taxation is unlimited, except as restricted by constitutional provisions. It may provide by assessment for a local improvement, and determine the basis of apportionment without regard to any special local benefit to the tax-payer. It may also determine in advance what property will be benefited, by designating the district in which the tax is to be collected, as well as the property upon which it is to be imposed.

**CONSTITUTIONAL LAW — TAXATION FOR LOCAL IMPROVEMENT.** — It is not necessary to the validity of a tax imposed for local improvement to show that all property within the district may be actually benefited, and even if it appears that no benefit is received by such property, it is not thereby exempted from bearing its portion of the assessment, nor is the act imposing the tax unconstitutional because it provides that such property shall be assessed.

**CONSTITUTIONAL LAW — IRRIGATION DISTRICT — ORGANIZATION — BONDS.** — The board of supervisors to whom petition must be made for the organization of an irrigation district under the California statute of March 7, 1887, is the sole judge of the sufficiency of the bond presented with such petition.

**CONSTITUTIONAL LAW — IRRIGATION DISTRICT — ORGANIZATION — DESCRIPTION.** — Under the California statute of March 7, 1887, providing that the petition presented to the board of supervisors for the organization of an irrigation district shall particularly describe and set forth the boundaries of such district, they need not be set forth with more particularity than would be necessary in a statute creating a particular district or a municipal corporation; and when the boundaries given embrace a distinct and definite territory, and are not so indefinite that the district cannot be definitely located, they are sufficient to authorize the organization of the district.

**JURISDICTION, WHEN MUST BE PROVED — IRRIGATION DISTRICTS — ORGANIZATION — EVIDENCE.** — If, in a proceeding to confirm the organization of an irrigation district, under the California statute of March 16, 1889, and also to confirm an order for the issue and sale of its bonds, the organization of the district is denied by answer, competent proof must be produced showing that a petition was presented to the board of supervisors, signed by the required number of *bona fide* freeholders, as required by the statute of March 7, 1887, providing for the organization of such district; and the proper execution of such petition cannot be proved by recitals in the records of the board of supervisors, showing that it was satisfied by evidence of the sufficiency of the petition, nor is the petition itself proper evidence without proof of its execution and sufficiency.

**IRRIGATION DISTRICTS — ORGANIZATION — ISSUANCE OF BONDS.** — In a proceeding to confirm the organization of an irrigation district, and of an order for the issuance of its bonds, under the California statutes of March 7, 1887, and of March 16, 1889, the fact that the order for the issuance of the bonds is not in strict compliance with the statute will not invalidate the proceedings, as the provisions of the statute may still be followed by the officers of the district when the issuance of the bonds becomes necessary.

**IRRIGATION DISTRICTS — JUDGMENT CONFIRMING ORGANIZATION — INJUNCTION.** — A judgment confirming the organization of an irrigation district,



organized under the California statutes of March 7, 1887, and of March 16, 1889, cannot include an injunction debarring all persons interested in such organization, save the contestants represented, from thereafter disputing, denying, or disclaiming any fact or facts which might have been disputed in such proceeding. The court cannot thus enjoin those interested, against whom there has been no service except by publication of notice, as this is not authorized by such statutes.

**CONSTITUTIONAL LAW — IRRIGATION DISTRICT — INDEBTEDNESS.** — A constitutional provision prohibiting certain specified public corporations from incurring indebtedness without the consent of two thirds of their qualified electors is limited to the corporations named, and does not apply to irrigation districts or other public corporations, not named therein, and authorized to be incorporated by statute. As to the latter, the legislature has power to provide the terms and conditions upon which an indebtedness may be created by them, and the amount thereof.

**CONSTITUTIONAL LAW — IRRIGATION DISTRICT INCLUDING ANOTHER MUNICIPAL CORPORATION.** — A statute authorizing the organization of irrigation districts as public corporations, and the issuance of bonds thereby, and regulating the method of assessment and taxation to pay such bonds, is not rendered unconstitutional, nor is the organization of such district rendered invalid by the fact that a city which has been incorporated for another purpose is included within its boundaries. The liability of such city to bear its proportion of such taxation is of the same character as rests upon any of the inhabitants of any city for its proportion of all the indebtedness of the county in which it is situated.

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*C. C. Wright, Hinds and Merriam, and Craig and Meredith*, for the respondents.

**HARRISON, J.** The board of directors of the Madera Irrigation District, on the 25th of May, 1889, filed in the superior court of the county of Fresno, in pursuance of the act of March 16, 1889 (Stats. 1889, p. 212), a petition for the confirmation by that court of their proceedings for the issue and sale of certain bonds of said district, amounting to eight hundred and fifty thousand dollars. In their petition, they alleged that "said Madera Irrigation District was duly organized under the laws of the state of California, and especially under the provisions of the act approved March 7, 1887" (Stats. 1887, p. 29), and set forth the various steps taken by them in reference to the issue and sale of the bonds, and prayed "that the proceedings aforesaid for the issue and sale of the bonds of said district may be examined, approved, and confirmed by said court, and for all and any legal and equitable relief



which may be provided by law, and which the court shall deem meet." Notice was thereupon given by order of the court that the hearing of said petition would be had July 5, 1889; and prior to that day the appellants herein filed answers thereto, showing that they were owners of lands within the district to be affected by said bonds, and specifically denying the allegations in said petition. At the hearing upon the issues presented by the answers of the appellants, the court rendered its judgment in favor of the petitioners, and approved and confirmed "the legality and the validity of each and all of the proceedings for the organization of said Madera Irrigation District"; and further adjudged and decreed that "each and all of the proceedings taken to secure and provide for and authorizing the issue and sale of bonds of said district in the sum of eight hundred and fifty thousand dollars, and affecting the legality and validity of said bonds, up to and including the resolutions and orders of the board of directors of said district, made March 13, 1889, authorizing the issuance and sale of said bonds, be and the same are hereby approved and confirmed." From this judgment an appeal has been taken directly upon the judgment roll, bringing here the proceedings at the trial of the issues by a bill of exceptions.

In presenting their appeal, the appellants have contended that the act of March 7, 1887, under which the proceedings for the organization of the district were had, is unconstitutional, for the reason that it is in its nature beyond the power of the legislature to enact, and also by reason of the provisions therein contained for the organization of the district, and the mode provided for assessments upon the lands in said district with which to meet the bonds authorized by the act. It is also contended by them that at the hearing of the proceedings in the court below, the petitioners did not establish by competent evidence that there had been such compliance with the requirements of the act as would constitute a district, or give any authority to provide for the issuance of the bonds in question, and that the evidence upon which the court made its findings was improperly admitted and considered by it.

The constitutionality of the act in question was passed upon by this court and affirmed in the case of *Turlock Irrigation District v. Williams*, 76 Cal. 360, and also in the case of *Central Irrigation District v. De Lappe*, 79 Cal. 351; but inasmuch as counsel have made elaborate arguments herein in review of the conclusion reached in those cases, we have again exam-

ined the question in the light of these arguments, and in affirming those decisions we present the reasons upon which we again hold the act to be constitutional, more at length than was presented in the former opinions.

1. That the legislature is vested with the whole of the legislative power of the state, and that it has authority to deal with any subject within the scope of civil government, except in so far as it is restrained by the provisions of the constitution, and that it is the sole tribunal to determine as well the expediency as the details of all legislation within its power, are principles so familiar as hardly to need mention. The declaration in article 4, section 1, of the constitution: "The legislative power of this state shall be vested in a senate and assembly, which shall be designated the legislature of the state of California," — comprehends the exercise of all the sovereign authority of the state in matters which are properly the subject of legislation; and it is incumbent upon any one who will challenge an act of the legislature as being invalid to show, either that such act is without the province of legislation, or that the particular subject-matter of that act has been by the constitution, either by express provision or by necessary implication, withdrawn by the people from the consideration of the legislature. The presumption which attends every act of the legislature is, that it is within its power; and he who would except it from the power must point out the particular provision of the constitution by which the exception is made, or demonstrate that it is palpably excluded from any consideration whatever by that body.

In providing for the welfare of the state and its several parts, the legislature may pass laws affecting the people of the entire state, or when not restrained by constitutional provisions, affecting only limited portions of the state. It may make special laws relating only to special districts, or it may legislate directly upon local districts, or it may intrust such legislation to subordinate bodies of a public character. It may create municipal organizations or agencies within the several counties, or it may avail itself of the county or other municipal organizations for the purposes of such legislation, or it may create new districts embracing more than one county, or parts of several counties, and may delegate to such organizations a part of its legislative power, to be exercised within the boundaries of said organized districts, and may vest them with certain powers of local legislation, in respect

to which the parties interested may be supposed more competent to judge of their needs than the central authority. "The members of the two houses are the constitutional agents of the public will in every district or locality of the state; and they may therefore so arrange the powers to be given and executed therein as convenience, the efficiency of administration, and the public good may seem to require, by committing some functions to local jurisdictions already established, or by establishing local jurisdictions for that express purpose": *People v. Salomon*, 51 Ill. 50. "If from exceptional causes the public good requires that legislation, either permanent or temporary be directed towards any particular locality, whether consisting of one county or several counties, it is within the discretion of the legislature to apply such legislation as, in its judgment, the exigency of the case may require, and it is the sole judge of the existence of such causes. The representatives of the whole people convened in the two branches of the legislature are subject to the exceptions which have been mentioned,—the organs of the public will in every district or locality of the state. It follows that it falls to the legislature to arrange and distribute the administrative functions, committing such portions as it may deem suitable to local jurisdictions, and retaining other portions to be exercised by officers appointed by the central power, and changing the arrangement from time to time, as convenience, the efficacy of administration, and the public good may seem to require": *People v. Draper*, 15 N. Y. 544.

In providing for the public welfare, or in enacting laws which, in the judgment of the legislature, may be expedient or necessary, that body must determine whether or not the measure proposed is for some public purpose. We do not mean by this that the declaration of the legislature that an act proposed by it will be for the public good will of necessity preclude an investigation therein, or that such declaration will be conclusive when the act itself is palpably otherwise: *Consolidated Channel Co. v. Central Pac. R. R. Co.*, 51 Cal. 269. Acts may be passed by that body which will, by their very terms or the nature of their provisions, show that their purpose is private, rather than public. Such are the acts that were involved in the cases of *Loan Association v. Topeka*, 20 Wall. 664; *Allen v. Inhabitants of Jay*, 60 Me. 124; 11 Am. Rep. 185; *Lowell v. City of Boston*, 111 Mass. 454; 15 Am. Rep. 39; *State v. Osawkee*, 14 Kan. 419; 19 Am. Rep. 99; *Peo-*

*ple v. Parks*, 58 Cal. 624. But if the subject-matter of the legislation be of such a nature that there is any doubt of its character, or if by any possibility the legislation may be for the welfare of the public, the will of the legislature must prevail over the doubts of the court: *Stockton etc. R. R. Co. v. City of Stockton*, 41 Cal. 147. It may be more difficult to define in advance the line of separation between a purpose which is private and one which is public than to determine whether in the individual case the act is for a public or a private purpose; and, as was said by Mr. Justice Miller in *Davidson v. New Orleans*, 96 U. S. 104, it is wiser to proceed "by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require." Whenever it is apparent from the scope of the act that its object is for the benefit of the public, and that the means by which the benefit is to be attained are of a public character, the act will be upheld, even though incidental advantages may accrue to individuals beyond those enjoyed by the general public. We have recently held that an appropriation by the legislature of three hundred thousand dollars for the World's Fair Columbian Exposition at Chicago is to be sustained as a legitimate appropriation of the public moneys of the state, upon the ground that it is one of the objects of government to promote the public welfare of the state, and to provide for the material prosperity of its people, and that it is for the legislature to determine the manner and the extent to which it will exercise this function of government, and that its determination upon that point is limited by its own discretion, and beyond the interference of courts. The same rules of construction must be applied to the exercise of legislative authority in authorizing an expenditure for a local improvement. Such authorization is a legislative declaration that the expenditure is for a public purpose, and for the welfare of the public, and its action is not to be disregarded by the courts upon an assumption by them that such legislation is unwise, or that it may be injurious to some of the individuals who are affected by it.

In determining whether any particular measure is for the public advantage, it is not necessary to show that the entire body of the state is directly affected thereby, but it is sufficient that that portion of the state within the district provided for by the act shall be benefited thereby. The state is made up of its parts, and those parts have such a reciprocal influence upon each other that any advantage which accrues to

one of them is felt more or less by all of the others. A legislature that should refrain from all legislation that did not equally affect all parts of the state would signally fail in providing for the welfare of the public. In a state as diversified in character as in California, it is impossible that the same legislation should be applicable to each of its parts. Different provisions are as essential for those portions whose physical characteristics are different as are needed in the provisions which are made for the government of town and country. Those portions of the state which are subject to overflow, and those which require drainage, as well as those which, for the purpose of development, require irrigation, fall equally within the purview of the legislature, and its authority to legislate for the benefit of the entire state or for the individual district.

The power of the legislature to adapt its laws to the peculiar wants of each of these districts rests upon the same principle, viz., that it is acting for the public good, in its capacity as the representative of the entire state. Under this principle, levee districts have been organized directly by the legislature itself, and their organization has been authorized by the legislature through the board of supervisors of the county in which the district is situated: Stats. 1867-68, p. 816. Such legislation was upheld in *Dean v. Davis*, 51 Cal. 406. Under the same principle, reclamation districts have been organized, and their creation upheld as a legitimate exercise of legislative power. In passing upon this question in *Hagar v. Board of Supervisors of Yolo County*, 47 Cal. 233, the supreme court said: "The power of the legislature to compel local improvements which, in its judgment, will promote the health of the people and advance the public good is unquestionable. In the exercise of this power, it may abate nuisances, construct and repair highways, open canals for irrigating arid districts, and perform many other similar acts for the public good, and all at the expense of those who are to be chiefly and more immediately benefited by the improvement"; and in answer to the suggestion that such was merely a local improvement, the court said: "But we need not rest our decision on the narrow ground that this is strictly a local improvement; on the contrary, the reclamation of the vast bodies of swamp and overflowed land in this state may justly be regarded as a public improvement of great magnitude, and of the utmost importance to the community. If left wholly to individual

enterprise, it probably would never be accomplished; and in inaugurating so great a work, the legislature has pursued substantially the same system adopted in other states for the reclamation of similar lands, to wit, by dividing the territory to be reclaimed into districts, and assessing the cost of the improvement on the lands to be benefited"; and refer, in support of the opinion, to the acts of different states in which similar improvements had been authorized.

The reasons given in that case are fully as potent in support of the authority exercised in the matter of an irrigation district; and, notwithstanding it is urged by counsel for appellants that the authority for reclaiming overflowed lands is to be upheld only as a sanitary measure, it will be seen that that is not the only ground upon which the court based its decision. Nor do we think that it rests upon that ground alone. In our opinion, a more liberal construction should be given to the authority under which such a district is established. Certainly, these grounds are not the basis of the authority for the creation of a levee district; that rests, not upon any sanitary ground, but upon the ground of protection to the parties who would be affected by the overflow: *Williams v. Cammack*, 27 Miss. 222; 61 Am. Dec. 508; *Wallace v. Shelton*, 14 La. Ann. 503. Upon this subject, Mr. Cooley says: "But where any considerable tract of land owned by different persons is in a condition precluding cultivation by reason of excessive moisture which drains would relieve, it may well be said that the public have such an interest in the improvement and the consequent advancement of the general interest of the locality as will justify the levy of assessments upon the owners for drainage purposes. Such a case would seem to stand upon the same solid ground with assessments for levee purposes which have for their object to protect lands from falling into a like condition of uselessness": Cooley on Taxation, 617.

We have not been cited to the statute of any other state which provides for irrigating arid lands, or to any authority in which the power of the legislature over the subject is discussed, but we have no hesitation in saying that the principles upon which the decisions to which we have referred were made are applicable to sustain the legislative authority in making provision for such irrigation. Whether the reclamation of the land be from excessive moisture to a condition suitable for cultivation, or from excessive aridity to the same condition, the



right of the legislature to authorize such reclamation must be upheld upon the same principle, viz., the welfare of the public, and particularly of that portion of the public within the district affected by the means adopted for such reclamation. Whatever tends to an increased prosperity of one portion of the state, or to promote its material development, is for the advantage of the entire state; and the right of the legislature to make provision for developing the productive capacity of the state, or for increasing facilities for the cultivation of its soil according to the requirements of the different portions thereof, is upheld by its power to act for the benefit of the people in affording them the right of "acquiring, possessing, and protecting the property" which is guaranteed to them by the constitution. The local improvement contemplated by such legislation is for the benefit and general welfare of all persons interested in the lands within the district, and is a local public improvement. This principle is not contravened by the fact that it may even operate injuriously upon some of the individuals or proprietors of land within the district, or by the fact that there may be some who for personal motives may wish to resist the improvement. Such result is only a sacrifice which the individual makes to the general good, in compensation for the advantages enjoyed by virtue of the social compact. All laws of this character are upheld upon the same principle as is the creation of a district for the purpose of any other local improvement, such as the opening of a highway, or of a street, or of a public park. The legislature, to which has been confided the matter, has determined that it will be for the public good that such street or park be opened, and it has imposed the burden of such opening upon the property within a limited district. In each of such instances the land taxed for the improvement may not be the only land that will be benefited. Although land adjacent to the district may be incidentally benefited, that is no reason for taxing such land, nor is it any objection to the proceeding that some of the property within the district will not receive any benefit or that the improvement will more specifically benefit those who have procured its creation.

"It has never been deemed essential that the entire community, or any considerable portion of it, should directly enjoy or participate in an improvement or enterprise, in order to constitute a public use, within the meaning of these words as used in the constitution. Such an interpretation would greatly

narrow and cripple the authority of the legislature, so as to deprive it of the power of exerting a material and beneficial influence on the welfare and prosperity of the state. In a broad and comprehensive view, such as has been heretofore taken of the construction of this clause of the declaration of rights, everything which tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the inhabitants of a section of the state, or which leads to the growth of towns, and the creation of new sources for the employment of private capital and labor, indirectly contributes to the general welfare and to the prosperity of the whole community": *Talbot v. Hudson*, 16 Gray, 425.

The means by which the legislature may exercise this power is left to its own discretion, except as it may be limited by the constitution. If, in the exercise of its care for the public welfare, it finds that a specific district of the state needs legislation that is inapplicable to other parts of the state, it may, in the absence of constitutional restrictions, legislate directly for that district, or if it be the case that similar legislation be required for other portions of the state, it may provide for adapting such legislation to those portions, at the will of the people in such districts, as was done in the reclamation and levee laws already referred to. It may, too, by general laws, authorize the inhabitants of any district, under such restrictions and with such preliminary steps as it may deem proper, to organize themselves into a public corporation, for the purpose of exercising those governmental duties, upon the same principle as it authorizes the incorporation of any municipal corporation under general laws.

The constitution of California has been framed with the principle of investing separate subdivisions of the state with local government, and especially authorizes the legislature to confer the power of local legislation upon such subdivisions within the state as may be organized under its authority. The legislature is itself forbidden to interfere in any manner, except by general laws, with the power of local legislation intrusted to such organizations; nor can it delegate to any but public corporations the power to perform any municipal functions whatever, or vest in any but the corporate authority of a municipal corporation the power to assess and collect taxes for any municipal purpose. But although the legislature is prevented from passing any special or local law which shall



be applicable to only a particular portion or district of the state, its power of legislation for the public good in that portion of the state has not been destroyed. It still retains the full power of legislation conferred upon it in the constitution, but is required to exercise such power in the mode prescribed in that instrument. It may pass general laws, which, from their nature, will be capable of enforcement in only particular portions of the state; or it may by other general laws authorize the organization of municipal corporations which, from the nature of the functions intrusted to them, can find occasion for organization only in certain portions of the state; and it may by such general laws provide for the organization of such and as many species of municipal corporations as, in its judgment, are demanded by the welfare of the state, and the "protection, security, and benefit of the people," for which government is instituted, and which has been by the people confided to it: Const., art. 1, sec. 2.

The provision in article 11, section 6, of the constitution, "Corporations for municipal purposes shall not be created by special laws," does not imply that the legislature must by any general law provide a plan in which shall be prescribed the mode under which all municipal corporations must be organized, and the powers that they can exercise. The provision in article 12, section 1, that private corporations "may be formed under general laws, but shall not be created by special act," although more explicit, and under the declaration of the constitution itself, article 1, section 22, "mandatory," rather than permissive, requiring that they must be formed under general laws, has never been construed as requiring that all private corporations must be formed under the same general law, or limited to the exercise of the same powers. On the contrary, the form of organization, as well as the powers to be exercised, have been by legislation adapted to the character of the corporation to be organized. All corporations of the same class are required to be organized in the same manner, but the nature of the organization does not permit, nor does the constitution require, that corporations of different classes shall be organized in the same manner, or provided with the same powers. Hence the provisions that have been made by the legislature for the organization and powers of railroad, insurance, religious, mining, and other business corporations have been adapted to their respective character and needs. With greater propriety has it been left to the legislature to provide the mode

of organization and the powers to be exercised by different species of municipal corporations. Such corporations are but the agents or representatives of the state in the particular locality in which they exist. They are organized for the purpose of carrying out the purposes of the legislature in its desire to provide for the general welfare of the state, and in the accomplishment of which legislative convenience or constitutional requirements have made them essential. Although in this state the legislature is required to provide such agencies under general laws, it is authorized, under its general power of legislation, to invest such corporations, when created, with the same powers which, without such restriction, it could itself have exercised; and in providing for such organizations, it need confer upon them only such powers as in its judgment are proper to be exercised by them in the discharge of the particular functions of government which may be conferred upon them. Being the representatives of the legislature in the various localities of the state, the requirements for organization, as well as the powers to be exercised, vary with the character of the purpose for which they may be created. Hence the general laws which the legislature may enact for the organization of public corporations may be as numerous as the objects for which such corporations may be created. For each of these objects the law is the same, but there would be a manifest impropriety in requiring that the organization of a levee district or an irrigation district should be conducted in the same manner as the organization of a corporation for the management of a public park or the control of the school department. Whether the districts to which such general laws are applicable, or in which the people thereof may avail themselves of the privilege conferred, be many or few, is immaterial. Even if there be but a single district to which the law is applicable at the time of its enactment, the legislature would be justified, under its legislative power, to pass general laws in making such provision for that district. Whenever a special district of the state requires special legislation therefor, it is competent for the legislature, by general law, to authorize the organization of such district into a public corporation, with such powers of government as it may choose to confer upon it. It is not necessary that such public corporation should be vested with all governmental powers, but the legislature may clothe it with such as, in its judgment, are proper to be exercised within and for the benefit of such district. Being created for

the purpose of discharging only one public purpose, it is not requisite that it have power not necessary therefor, or which would be appropriate to a corporation organized for some other purpose. Neither is it requisite that such corporation should have legislative or judicial powers conferred upon it. It may be organized for the mere purpose of exercising executive and administrative functions, with the added power of making such prudential rules and regulations as may be necessary for the exercise of the particular functions intrusted to its charge. The powers committed to a public corporation organized for the administration of a public park, or for the government of a levee district, or for the control of the police department, need be only such as are peculiarly appropriate to such organizations.

It is contended that the act is unconstitutional, for the reason that it is a delegation of the legislative power to create a corporation. If by this is meant that only the legislature can create such corporation, the answer is, that the constitution prohibits such action. If it is meant that because the corporation is not "created" until the voters of the district have accepted the terms of the act, the answer is, that such proceeding is in direct accord with the principles of the constitution. Having the power to create municipal corporations, but being prohibited from creating them by special laws, the only mode in which such corporations could be created under a general law would be by some act on the part of the district or community seeking incorporation indicative of its determination to accept its terms. As the constitution has not limited or prescribed the character of such general law, its character and details are within the discretionary power of the legislature. We know of no more appropriate mode of such indication than the affirmative vote of those who are to be affected by the acceptance of the terms of the act.

The municipal corporations which may be thus created are not limited to cities and towns. The constitution makes provision in various places for municipal corporations other than cities and towns: Art. 11, secs. 9, 10, 12, 16. In each of these sections provision is made with reference to the government of officers of "county, city, town, or other public or municipal corporation," thus clearly indicating that there may be municipal corporations other than those of a town or city, and consequently that the provisions with reference to the incorporation of cities and towns, found in section 6 of the

same article, are not controlling in the organization of other municipal corporations; and that while the constitution carefully provides for the "incorporation, organization, and classification" of cities and towns, it makes no similar provision for other municipal corporations, but very properly leaves such action to the discretion of the legislature. Inasmuch as there is no restriction upon the power of the legislature to authorize the formation of such corporations for any public purpose whatever, and as when organized they are but mere agencies of the state in local government, without any powers except such as the legislature may confer upon them, and are at all times subject to a revocation of such power, it was evidently the purpose of the framers of the constitution to leave in the hands of the legislature full discretion in reference to their organization.

In the present case the legislature has chosen to authorize the creation of a public corporation in the manner and with the forms specified in the act under discussion. For this purpose it has provided that a petition of fifty freeholders, or a majority of the freeholders, owning lands within a proposed district susceptible of one mode of irrigation, shall be presented to the board of supervisors of the county within which such lands are situate, and that the board of supervisors shall, upon the hearing of such petition, after notice thereof, determine whether or not it will take steps to organize an irrigation district, and that upon such determination an election shall be ordered, at which, if two thirds of the electors within the district shall vote in favor of such organization, the district shall thereupon be organized, and its management confided to a board of directors chosen by the electors of that district. It is objected to this, that it is placing in the hands of those not interested the power of imposing a burden upon the owners of the land, who may be a small minority of the electors within that district, or who may even be non-residents of the district. This, however, is a matter which was addressed purely to the discretion of the legislature. Whether such a petition should be made by the owners of a fixed proportion of the land, as was required in the reclamation law, or whether there should be any qualification to the petitioners, or whether there should be any limit to the expenses which they were authorized to incur for the purposes of the improvement, are questions which were solely for the consideration of the legislature. It is not for this department of the government to question the

policy or the prudence of a co-ordinate branch. If those who are affected by its proceedings feel that it has not given them sufficient protection, or placed sufficient safeguards around the institution of the corporation, they must seek redress from that body. We can only act upon the law as it has been enacted. It must be observed, however, that this petition has no binding operation, but is merely the initiatory step which gives to the board of supervisors a jurisdiction to act upon the expediency or policy of authorizing the creation of the district. That body is the representative of the county, and has been chosen by its electors for the express purpose of legislation upon local subjects, and may naturally be supposed to have the interests of the entire county, as well as of each of its parts, in charge, and to be acquainted with its needs and requirements. The legislature has not, however, intrusted that body with the final determination of the question, but has authorized it to submit the question to a vote of the electors of the district, and it is only when these electors have determined by a vote of two thirds of their number in favor thereof that the district can be created as a political body. The objection that this vote may be carried by a majority of those who have no interest in the lands affected thereby is but an incident, and not of the essence of the matter. It is no more than exists in every popular vote which involves the creation of a municipal debt or the adoption of a municipal organization. The fact that the owners of the lands are non-residents within the district, and not allowed a voice in the proceedings, is of the same character. Property qualification for voting, either in amount or character, is expressly forbidden by article 1, section 24, of the constitution, which declares: "No property qualification shall ever be required for any person to vote or hold office"; and however much non-residents may be affected by the acts and vote of the community, only those who are inhabitants of the district can, by the constitution, be permitted to vote at any election: Art. 2, sec. 1.

That an irrigation district organized under the act in question becomes a public corporation is evident from an examination of the mode of its organization, the purpose for which it is organized, and the powers conferred upon it. It can be organized only at the instance of the board of supervisors of the county, — the legislative body of one of the constitutional subdivisions of the state; its organization can be effected only upon the vote of the qualified electors within its boundaries;

its officers are chosen under the sanction and with the formalities required at public elections in the state,—the officers of such election being required to act under the sanction of an oath, and being authorized to administer oaths when required, for the purpose of conducting the election; and the officers, when elected, being required to execute official bonds to the state of California, approved by a judge of the superior court. The district officers thus become public officers of the state. When organized, the district can acquire, either by purchase or condemnation, all property necessary for the construction of its works, and may construct thereon canals and other irrigation improvements, and all the property so acquired is to be held by the district in trust, and is dedicated for the use and purposes set forth in the act, and is declared to be a public use, subject to the regulation and control of the state. For the purpose of meeting the cost of acquiring this property, the district is authorized, upon the vote of a majority of its electors, to issue its bonds, and these bonds and the interest thereon are to be paid by revenues derived under the power of taxation, and for which all the real property in the district is to be assessed. Under this power of taxation,—one of the highest attributes of sovereignty,—the title of the delinquent owner to the real estate assessed may be divested by sale, and power is conferred upon the board of directors to establish equitable by-laws, rules, and regulations for the distribution and use of water among the owners of said lands, and generally to perform all such acts as shall be necessary to fully carry out the purpose of the act. Here are found the essential elements of a public corporation, none of which pertain to a private corporation. The property held by the corporation is in trust for the public, and subject to the control of the state. Its officers are public officers, chosen by the electors of the district, and invested with public duties. Its object is for the good of the public, and to promote the prosperity and welfare of the public. “Where a corporation is composed exclusively of officers of the government, having no personal interest in it or with its concerns, and only acting as organs of the state in effecting a great public improvement, it is a public corporation”: Angell and Ames on Corporations, sec. 82. “A municipal corporation proper is created mainly for the interest, advantage, and convenience of the locality and of its people. The primary idea is an agency to regulate and administer the interior concerns of the locality in matters peculiar to the place



incorporated, and not common to the state or people at large": 15 Am. Eng. & Ency. of Law, 954. "Public corporations are such as are created for the discharge of public duties in the administration of civil government": Lawson's Rights and Remedies, sec. 332.

The constitutionality of the act in question is further assailed upon the ground that it makes no provision for a hearing from the owners of the land prior to the organization of the district. But the steps provided for the organization of the district are only for the creation of a public corporation to be invested with certain political duties, which it is to exercise in behalf of the state: *Dean v. Davis*, 51 Cal. 406. It has never been held that the inhabitants of a district are entitled to notice and hearing upon a proposition to submit such question to a popular vote. In the absence of constitutional restriction, it would be competent for the legislature to create such public corporation, even against the will of the inhabitants. It has as much power to create the district in accordance with the will of a majority of such inhabitants. It must be observed that such proceeding does not affect the property of any one within the district, and that he is not by virtue thereof deprived of any property. Such result does not arise until after delinquency on his part in the payment of an assessment that may be levied upon his property, and before that time he has opportunity to be heard as to the correctness of the valuation which is placed upon his property, and made the basis of his assessment. He does not, it is true, have any opportunity to be heard, otherwise than by his vote in determining the amount of bonds to be issued, or the rate of assessment with which they are to be paid; but in this particular he is in the same condition as is the inhabitant of any municipal organization which incurs a bonded indebtedness, or levies a tax for its payment. His property is not taken from him without due process of law, if he is allowed a hearing at any time before the lien of the assessment thereon becomes final: *People v. Smith*, 21 N. Y. 595; *Gilmore v. Hentig*, 33 Kan. 170; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701; *Davies v. Los Angeles*, 86 Cal. 46.

It is also objected that the mode provided for the payment of the bonds is unconstitutional, in that it provides for an assessment upon the real property within the district according to its value, and not according to the benefit which each particular parcel of land may derive from the improvement.

The power of the legislature in matters of taxation is unlimited, except as restricted by constitutional provisions. This is one of the attributes of sovereignty which the people have placed in its hands; and they have intrusted its exercise to its discretion, either in the manner or to the extent to which it is to be applied. All taxation has its source in the necessities of organized society, and is limited by such necessity, and can be exercised only by some demand for the public use or welfare. And whether the tax be by direct imposition for revenue, or by assessment for a local improvement, it is based upon the theory that it is in return for the benefit received by the person who pays the tax, or by the property which is assessed. For the purpose of apportioning this benefit, the legislature may determine in advance what property will be benefited, by designating the district within which it is to be collected, as well as the property upon which it is to be imposed, or it may appoint a commission or delegate to a subordinate agency the power to ascertain the extent of this benefit. It may itself declare that the entire state is benefited, and authorize the burden to be borne by a public tax, or it may declare that all or a portion of the property within a limited region is benefited, either according to its value or in proportion to its actual benefit, to be specifically ascertained by actual determination of officers appointed therefor. Upon the power of the legislature over the subject of taxation, as well as the modes in which and the objects upon which it may be exercised, we know of nothing that has been written in any opinion since that of Judge Ruggles in *People v. Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266, which is not either an amplification of the views therein expressed, or an adaptation of them to the particular subject under discussion. In the exhaustive opinion of Mr. Justice Sawyer in *Emery v. San Francisco Gas. Co.*, 28 Cal. 345, the principles declared in that opinion were applied to the case then before the court, wherein this power of taxation was shown to be the foundation for upholding the right of assessment in a manner different from the *ad valorem* principle. The controversy upon this subject has almost invariably been against the "front-foot" rule, and in favor of the *ad valorem* principle, and in nearly every state, unless it be New Jersey, the principle has been maintained that it is within the power of the legislature to adopt whichever rule it may select. In *Burnett v. Sacramento*, 12 Cal. 76, 78 Am. Dec. 518, the charter of Sacramento provided that the expense of a local improve-



ment should be assessed upon the adjacent property according to its value; and upon this point the supreme court, speaking through Judge Field, said: "The law in question avoids the injustice of general taxation for local purposes, and lays the burden upon the recipients of the benefit. It apportions the tax according to the assessed cash value of the adjacent property, which is as near an approximation to an equitable rule as can well be established. No rule could be adopted which would work absolute equality. An approximation to it is all that can be attained. The power of apportionment, like the power of taxation, is exclusively in the legislature. The constitution contains no inhibition to the tax, and prescribes no rule of apportionment. Security against the abuse of the power rests in the wisdom and justice of the members of the legislature and their responsibility to their constituents." Assessments for local improvements according to the value of the property assessed have been upheld in *Downer v. Boston*, 7 Cush. 277; *Snow v. Fitchburg*, 136 Mass. 183; *Gilmore v. Hentig*, 33 Kan. 174; *Strowbridge v. Portland*, 8 Or. 82; *Creighton v. Scott*, 14 Ohio St. 438; *Lockwood v. St. Louis*, 24 Mo. 20.

It is, however, for the legislature to determine how the apportionment shall be made; and while it is held that an apportionment of the expenses for a local improvement is to be made according to the benefits received by the property assessed, yet the power to make such apportionment rests upon the general power of taxation, and the apportionment itself does not depend upon the fact of local benefit in any other sense than that all taxes are supposed to be based upon the benefit received by the tax-payer. As was said by Mr. Justice Temple in *Lent v. Tillson*, 72 Cal. 428: "The main practical difference between assessment for a local improvement and general taxation seems to be, that in general taxation it is difficult and generally impossible for the court to say that the purpose of the tax is not a public purpose, or that no benefit will result to the tax-payers, while in local assessments it is more often easy to see that the improvement will not be a special benefit. Still, the benefit is not the source of the power. That is inherent in the government, and is only limited by express or implied limitations found in the constitution, or by its own nature and purposes. Within these limits the legislature is the sole judge of when and to what extent the power shall be used." And again: "The power being in the legislature, the limitations upon it must be found in the constitution, either

in express provisions or by implication, and there exists the same presumption that the law is within legislative power that applies to any other statute; that is, the law will not be declared unconstitutional unless it plainly appears to be so": Page 430. Mr. Cooley says, in his treatise on taxation (p. 622): "The power to determine when a special assessment shall be made, and on what basis it shall be apportioned, is wisely confided to the legislature, and could not, without the introduction of some new principle in representative government, be placed elsewhere." And in *Hagar v. Supervisors*, 47 Cal. 234, the court said: "It is equally clear that those clauses which provide that taxation shall be equal and uniform throughout the state, and which prescribe the mode of assessment, and the persons by whom it shall be made, and that all property shall be taxed, have no application to assessments levied for local improvements." In accordance with this principle, various modes of apportionment for the expenses of local improvements have been upheld. We have already seen that they have been upheld when made in accordance with the value of the property, as well as when made in proportion to the frontage of the lots. The legislature has also itself designated the district which will be benefited by the improvement, as was done in the Dupont Street improvement act (Stats. 1875-76, p. 433), and as has been provided in the general act for street improvements, where the entire frontage of the block is the district upon which the assessment is to be made: *Diggins v. Brown*, 76 Cal. 318. Assessments have also been upheld when made by commissioners appointed to make specific assessments upon the several parcels of land: *Pacific Bridge Co. v. Kirkham*, 64 Cal. 519; or when made according to the area of the land affected by the improvement: *Keese v. City of Denver*, 10 Col. 123. The legislature has itself levied a specific tax upon each acre of land within a district created by itself: *Egyptian Levee Co. v. Hardin*, 27 Mo. 495; 72 Am. Dec. 276; *Williams v. Cammack*, 27 Miss. 209; 61 Am. Dec. 508; *Alcorn v. Hamer*, 38 Miss. 652; and has authorized such tax to be levied by the district: *Wallace v. Shelton*, 14 La. Ann. 503; and has authorized a fixed uniform rate for each sewer upon the estimated cost of all the sewers within the district: *Leominster v. Conant*, 139 Mass. 384.

It is not necessary to show that property within the district may be actually benefited by the local improvement, and even if it positively appear that no benefit is received, such prop-

erty is not thereby exempted from bearing its portion of the assessment, nor is the act unconstitutional because it provides that such property shall be assessed. Property that is exempt from taxation has always been held subject to the burdens of assessment for local improvements; and property within a district that is not susceptible of receiving any immediate benefit from the improvement is nevertheless so indirectly benefited thereby that it must bear a portion of the burden. If within the limits of a levee district a parcel of land should be so situated as not to require the protection of the levee, that would be no reason for excluding it from its share of the expense; or if within the limits of a drainage district there should chance to be found a cliff, that would be no reason for exempting it from assessment.

The objection that the legislature has no authority to confer upon the supervisors of a county the right to create a corporation whose district shall embrace a portion of the territory of another county, does not arise in the present case. It is not contended that any portion of the Madera Irrigation District lies outside of the county of Fresno.

2. One of the objections to the sufficiency of the proceedings taken by the supervisors in authorizing a vote by the electors for the purpose of determining whether the district should be organized is, that the bond which accompanied the petition was so defective as to deprive the board of jurisdiction to authorize such election.

If it be conceded that the presentation to the board of a bond with the petition is a jurisdictional prerequisite to their consideration of the petition, we do not think that such element of jurisdiction was wanting in the present case. The bond which was presented, although informal, was not invalid, and was of binding obligation upon those who had signed it. In such a case the determination of its sufficiency by the board of supervisors was as conclusive as their determination respecting the pecuniary responsibility of its signers, or the amount for which the bond should be given.

3. Other objections to the constitutionality of the act and the sufficiency of the proceedings in the organization of the district have been presented by the appellants, but we think that they are covered by the views presented in the foregoing opinion. We do not think that the boundaries of the district or of the election precincts are so imperfectly described as to prevent the supervisors from acquiring jurisdiction for author-

izing the organization of the district. The provision in the statute that the petition shall particularly set forth and describe the boundaries does not mean that they shall be set forth and described with more particularity than would be necessary in an act of the legislature creating a political district or a municipal corporation. If the course of a boundary is given, it is not necessary that such course shall have been actually surveyed upon the ground before the boundary can be said to be particularly described; and a reference to an official map, or to a landmark designated upon such map, is as definite as would be a reference to the landmark itself. We cannot, from their description, say that the boundaries given in the petition are so indefinite that the district cannot be definitely located, or that they fail to embrace a distinct and definite territory. As illustrations of similar descriptions in acts of the legislature, we refer to the act incorporating the city of Sacramento (Stats. 1850, p. 70), and the act incorporating the city and county of San Francisco (Stats. 1856, p. 146); also the act setting forth the boundaries of the county of San Benito: Stats. 1873-74, p. 75. The case of *Crosby v. Dowd*, 61 Cal. 557, referred to by appellants, was expressly overruled in *De Sepulveda v. Baugh*, 74 Cal. 468; 5 Am. St. Rep. 455. The boundaries of a municipal corporation are not construed with any more strictness than is required in the case of a private grant. This subject was fully considered in *Central Irrigation District v. De Lappe*, 79 Cal. 351.

4. By the act of March 16, 1889 (Stats. 1889, p. 212), under which these proceedings were instituted, it is provided, in section 5, that "upon the hearing of such special proceedings the court shall have power and jurisdiction to examine and determine the legality and validity of, and approve and confirm, each and all of the proceedings for the organization of said district under the provisions of the said act, from and including the petition for the organization of the district, and all other proceedings which may affect the legality or validity of said bonds, and the order for the sale and the sale thereof." It is also provided, in section 2, that "the petition shall state the facts showing the proceedings had for the issue and sale of said bonds, and shall state generally that the irrigation district was duly organized, and that the first board of directors was duly elected; but the petition need not state the facts showing such organization of the district, or the election of said first board of directors." Section 4 of the act provides:

"The provisions of the Code of Civil Procedure respecting the . . . . answer to a verified complaint shall be applicable to . . . . an answer to said petition. . . . The rules of pleading and practice provided by the Code of Civil Procedure, which are not inconsistent with the provisions of this act, are applicable to the special proceeding herein provided for." The petition in the present case states "that said Madera Irrigation District was duly organized under the laws of the state of California, and especially under the provisions" of the act of March 7, 1887. The answers deny this allegation, and deny specifically that any of the steps required by the statute for the organization of the district were taken in reference thereto.

In order that the court might determine the legality and validity of the proceedings, it was required by the act in question to "examine" them. The act provides that it "shall have power and jurisdiction to examine and determine the legality and validity of, and approve and confirm, each and all of the proceedings for the organization of said district"; and unless it shall "examine" the proceedings, it would not have the power to "determine" their legality and validity. One step in the proceedings, and that which was the foundation of all others, and without which the whole superstructure of the corporation and its acts, culminating in the bonds sought to be validated, would have fallen, was, that a petition should have been presented to the board of supervisors, signed by fifty or a majority of freeholders owning lands within the boundaries of the proposed district. It was necessary, therefore, for the petitioners herein to make proof to the court that such a petition had been presented to the board of supervisors. Instead, however, of making such proof, they introduced in evidence the record of the proceedings of the board of supervisors, which contained recitals that a petition had been presented to said board, and that before hearing said petition, "evidence to the satisfaction of the board was adduced by petitioners upon the question whether or not there were fifty petitioners whose genuine signatures appeared affixed to said petition who were *bona fide* freeholders of lands within the proposed boundaries of said proposed irrigation district"; whereupon the board, having announced that they were satisfied that there were fifty such freeholders whose signatures appeared affixed to said petition, proceeded to hear said petition. The defendants objected to the introduction of this evidence, upon the ground that no foundation had been laid there-

for, and that it was irrelevant, immaterial, and incompetent to establish any issue before the court. The objections were overruled, and an exception taken by the defendants. The petitioners then offered in evidence a document purporting to be a petition, with the signatures of upwards of fifty names attached thereto. To the introduction of this document the defendants objected, upon the ground that its execution had not been shown, and that there was no evidence that the parties whose names appeared attached thereto were freeholders owning lands within the district. The court overruled the objection, to which the defendants excepted. In these rulings the court erred. There was no proof that the petition had been signed by either of the persons whose names were attached thereto, or that either of said persons was a freeholder owning lands within the boundaries designated in the petition. Whether a petition had been presented to the board of supervisors of such a character as to give to that board jurisdiction to act in accordance with the provisions of the law in question, was an issue before the court to be determined by competent evidence. A declaration by the board of supervisors that such a petition had been presented, even though such declaration was spread upon their records, was not competent evidence in this proceeding, as it was only hearsay. No board or tribunal can obtain jurisdiction by its own recital that it has jurisdiction. It may be held that when the question of such jurisdiction arises in some collateral proceeding, the act of the board in recognition of the sufficiency of the petition would be presumptive of such sufficiency; yet when the very issue to be determined by the court is, whether the petition was sufficient to give jurisdiction, such issue must be established by evidence as competent as that which is required to establish an issue in any other proceeding. In the absence of any statutory declaration respecting the character of the proof by which any fact may be established in a court of justice, it must be established in accordance with the common-law rules of evidence. It is sometimes provided by statute that in proceedings of this nature the act of the board of supervisors shall be *prima facie* evidence of the regularity of all proceedings prior to the making of the order, as was the case in *Damp v. Town of Dane*, 29 Wis. 426, and also in *In the Matter of Kiernan*, 62 N. Y. 459. The effect of such provision is to throw the burden of proof upon those who would challenge the sufficiency of the petition. In all cases it is essential that



there be proof of a sufficient petition, inasmuch as without it the board could acquire no jurisdiction to act, and its proceedings would be absolutely void. In the absence of such statutory provision, however, the burden of proving any affirmative allegation is upon him who makes it (Code Civ. Proc., sec. 1869), and it must be established under the ordinary rules of evidence. The statute in the present case is silent with reference to the effect as evidence of the action of the board of supervisors upon the petition. We are not aware of any statute which gives to their action any effect as evidence, or which makes their records evidence of any fact other than the corporate act therein recorded. Their records can be competent evidence of only such matters as they are by statute authorized to make matters of record. The statute herein does not authorize the board of supervisors to enter upon their records the facts which give them jurisdiction to hear the petition or any evidence of such facts, and the entry in their record of such facts or of such evidence does not give thereto any official sanction or right of recognition more than any other memorandum that may have been made by their clerk.

In *People v. Hagar*, 49 Cal. 232, when the question arose in a collateral proceeding, and it was contended that the certificate by the commissioners of a compliance by them with the requirements of the statute was evidence thereof, the court held otherwise, saying: "Whatever may have been the rule, if the statute had required the commissioners to state in their certificate to the assessment roll that they had jointly viewed and assessed the land, it is clear that the certificate can have no such conclusive effect, unless it was incumbent on the commissioners to certify that they acted jointly in viewing and assessing the land. But as the statute does not require them to state that fact in the certificate, their having voluntarily done so was a superfluous act, and instead of being conclusive of the fact that they acted jointly, was not even *prima facie* evidence of it."

It was held in *Dean v. Davis*, 51 Cal. 406, that in a collateral proceeding the regularity of the proceedings under which the district had been organized could not be questioned, under the rule that, being a *de facto* corporation, only the state could take advantage of any irregularity in its organization. In *Lent v. Tillson*, 72 Cal. 422, the court, however, questioned the power of the county court in that case to pass upon the questions upon which its jurisdiction depended, so as to

conclude an inquiry, even upon a collateral attack; and in *Kahn v. Supervisors*, 79 Cal. 400, the court said: "Nor should this jurisdiction be held to attach, whatever court may have ruled that the petition was signed by a majority, when in fact it was signed only by a minority, of the owners designated by the statute." The cases cited on behalf of the respondent in support of the action of the court below are all cases in which the question was presented in a collateral proceeding. In *Humboldt Co. v. Dinsmore*, 75 Cal. 604, it was admitted that the persons who signed the petition were freeholders. After jurisdiction had once been obtained, other proceedings subsequent thereto are movements within the jurisdiction, and can be questioned only by direct attack, but the fact of jurisdiction must be affirmatively shown whenever that is the issue to be determined.

It is unnecessary, however, in the present case, to determine what would be the rule if the question should arise in a proceeding where the jurisdiction would be collaterally attacked. The question does not arise collaterally here. The corporation has itself come into court and challenged an examination into the regularity of its organization, and asks the court to examine "each and all of the proceedings for the organization of said district." Upon such a proceeding it becomes as necessary for it to establish such regularity, and to give evidence of each step therein, as fully as if its acts were under investigation upon a writ of review, or as if the state were by *quo warranto* questioning its right to exercise the franchise of a corporation. In such a case it is incumbent upon it to make proof of every step required by statute for assuming corporate powers: High on Extraordinary Legal Remedies, 712, 716; *Larke v. Crawford*, 28 Mich. 88. Upon *certiorari*, though the inferior tribunal is required to certify only matters of record, yet if the jurisdictional facts do not appear of record, it must certify "not only what is technically denominated the record, but such facts, or the evidence of them, as may be necessary to determine whatever question as to the jurisdiction of the tribunal may be involved": *Blair v. Hamilton*, 32 Cal. 52; *People ex rel. v. Board of Delegates*, 14 Cal. 479; *Lowe v. Alexander*, 15 Cal. 300. The object of the act in question, as was said in *Board of Directors v. Tregea*, 88 Cal. 334, is for the purpose of affording to investors in the bonds the security of a judicial determination of their validity; and in order that this may have the effect intended by the legislature, it is not suffi-



cient for the court to perform the mere perfunctory office of recording the determination of the board of supervisors that its proceedings in the organization of the district were regular. The court is not a *lit de justice* for the mere purpose of entering of record the rescripts of the board of supervisors, and giving to them the dignity of its own judgment.

When the defendants controverted the allegations of the petition, that the irrigation district was duly organized, it became necessary for the petitioners to establish at the trial the facts showing that it had been duly organized.

Section 456 of the Code of Civil Procedure provides: "In pleading a judgment or other determination of a court, officer, or board, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading must establish on the trial the facts conferring jurisdiction." The provision in the act in question that the rules of pleading and practice provided by the Code of Civil Procedure should be applicable to this proceeding made it incumbent upon the petitioner to establish the due organization of the district by evidence competent therefor. We are not aware of any decision in this state in which it has been held that the decision of an inferior board upon the question of its own jurisdiction was conclusive on a collateral attack, or even *prima facie* evidence of the fact in a direct proceeding. In *Litchfield v. Vernon*, 41 N. Y. 123, the legislature had authorized a local improvement to be made "upon application of a majority of the owners of land in the district proposed to be assessed, and the sufficiency of an assessment therefor was afterwards contested in the courts. Upon the hearing in the court of appeals, that court used the following language: "This brings us to the only remaining question in the case, and that is, whether there was any competent evidence authorizing a finding that a majority of the owners of land within the territory made subject to assessment made application to the common council, requesting them to make application to the supreme court for the appointment of three commissioners, as provided by the first section of the act of 1859. The act itself is wholly silent as to how this essential fact shall be proved. The right of the common council to apply for the appointment of the commissioners lies at the foundation of the whole proceeding. Unless this right existed, all the proceedings in appointing the commissioners, and sub-

sequent thereto, are void. This right depends upon the question whether a majority of the land-owners petitioned the common council to proceed under the act. In the absence of such petition, the common council had no authority in the premises, and nothing could be done under the act. The act does not provide for the determination of this fact by the common council, nor by the special term, upon the presentation of the petition for the appointment of the commissioners. The act, being silent as to what should be deemed proof of the fact that a majority of the land-owners petitioned the common council, the plaintiff was bound to prove such fact by competent common-law evidence. This could be done by proof showing who were the owners of the land at the time of the passage of the act, and that a majority of such persons petitioned the common council, as required by the first section of the act. Neither the application of the council to the court, nor the affidavit of the mayor accompanying such application, was evidence of this fact against the defendant: *Sharp v. Speir*, 4 Hill, 76. There was no competent evidence of this fact given upon the trial, and the exception to the finding of this fact by the judge was well taken."

In *Thorn v. West Chicago Park Commissioners*, 130 Ill. 594, the same question was presented. The statutes of Illinois provided that the board of park commissioners might take jurisdiction over certain streets upon first obtaining the consent, in writing, of the owners of a majority of the frontage of the lots and lands abutting thereon, and also provided for a confirmation of any assessment made therefor by the circuit court, upon the application of the commissioners, after notice therefor to the lot-owners. At the hearing of the application for confirmation of the assessment-roll returned by the commissioners in the above case, the commissioners offered a paper purporting to be the petition and consent of the abutting lot-owners, and showed that such paper came from the files kept by the board of commissioners, and was the written consent acted upon by the board in adding the streets for the purpose contemplated. The court below, upon the objection to the competency of this evidence, held that this document made a *prima facie* case for the commissioners, and cast the burden upon the objectors to show that it was not the written consent of the property owners, as it purported to be. Upon appeal, however, the supreme court reversed the action of the court below, saying: "We cannot concur in the holding of the

trial court. As we have seen, the burden was on the park commissioners to show affirmatively the jurisdictional fact of consent by the owners of the required amount of frontage. The evidence in respect thereto was, we think, wholly insufficient. Waiving the matter of proving ownership by the persons purporting to sign the paper admitted in evidence, it is not shown that a sufficient number of such persons signed the consent to constitute consent by the owners of a majority of the abutting property. The only person introduced who testified generally to the execution of the writing testifies that he procured the signatures of most of the signers, but not all, and he does not testify, except in a few instances, either as to those he did or did not procure. The writing here offered is not signed by the objectors, and we are aware of no rule by which it was admissible in evidence against them, without proof of its execution, nor is the consent at all aided by the fact that the park commissioners acted upon the paper introduced in evidence. While the park commissioners must, in the first instance, pass upon the fact of consent by the owners of abutting property, and determine for themselves whether those owning a majority of the frontage of the property had consented to their appropriation of the street for the purposes contemplated by the act, such determination can have no effect when their jurisdiction is challenged in endeavoring to carry out the powers conferred by the statute. The power conferred upon the park board affects and impairs the right of the citizen, and may encumber his property without his consent, and may arbitrarily impose onerous burdens for which there is no relief or redress. The legislature has interposed the safeguard of requiring the consent of the owners of more than one half of the property to be affected, upon the presumption, no doubt, that what will be of benefit to the greater portion will not unduly prejudice the lesser part, and when the commissioners sought confirmation of their assessment upon appellant's property, under the power conferred by the statute, it was incumbent upon them to show compliance with the law, by which alone they obtained jurisdiction to impose the burden. This they have not done": See also *Pittsburg v. Walter*, 69 Pa. St. 365.

5. The order for the issuance of the bonds is, that eight hundred and fifty thousand dollars be issued, and that the said bonds shall be payable in installments, as follows: "At the expiration of eleven years, not less than five per cent of said bonds; at the expiration of twelve years, not less than

six per cent of said bonds," etc. Section 15 of the statute provides: "Said bonds shall be payable in gold coin of the United States, in installments as follows, to wit: At the expiration of eleven years, not less than five per cent of said bonds; at the expiration of twelve years, not less than six per cent," etc. In *Central Irrigation District v. De Lappe*, 79 Cal. 351, the form of the bond in connection with this provision of the statute was discussed. It was there held that the bonds to be issued should be in such form that each bond would be payable in installments of such percentage in each year as is designated in the statute, and that an order making that percentage of the entire issue of the bonds payable in the designated years would not be a compliance with the statute. In the present case, if five per cent of the eight hundred and fifty thousand dollars should be payable at the expiration of eleven years, and the board of directors should not sell or dispose of more than that percentage of the entire issue of bonds, it would make the entire amount of outstanding bonds payable at the expiration of eleven years; whereas the board of directors, under section 22 of the act in question, are authorized at the expiration of ten years after the issuing of said bonds to levy an assessment for only five per cent of the principal of the whole amount of bonds then outstanding.

This provision in the order does not, however, affect the substance of the order for the issuance of the bonds, but merely the form in which the bonds are to be issued, and does not itself invalidate the proceedings had by the district for the issuance of the bonds. The district voted for the issuance of bonds to the amount of eight hundred and fifty thousand dollars, to be issued in accordance with the provisions of the statute. The manner in which those bonds were to be issued is prescribed by the statute, and can be followed by the board whenever their issuance becomes necessary. The court, however, instead of approving and confirming this order, should have limited its order of confirmation to that portion thereof which designated the amount of the bonds to be issued, leaving to the board itself the duty of preparing the bonds in the form required by the statute.

6. In its decree, the court, after determining the legality and validity of the proceedings, added thereto the following: "And it is further ordered, adjudged, and decreed that all persons, and each and every person, interested in the organization of said irrigation district, save and except the appel-

lants herein, be forever debarred and precluded from disputing, denying, or disclaiming any fact or facts relating to the organization of the said district, or providing for and authorizing the issue and sale of the bonds of said district, which might by them have been denied, questioned, or disputed in this proceeding."

This portion of its judgment was unauthorized. The statute does not confer upon the court any power or jurisdiction to do more than "examine and determine the legality and validity of, and approve and confirm," the proceedings had under said act. What the effect of its determination and judgment may be is to be determined by the court in which it shall at any time hereafter be offered in evidence. The statute makes no provision for including therein an injunction against those who may not have seen fit to question its action in this proceeding, and against whom there has been no service, except by the publication of the notice directed by the court. If by virtue of such inaction on their part they should be hereafter precluded or estopped from questioning the sufficiency of the action of the court in this proceeding, that question must be determined by the court in which any attempt may be made to avoid the effect of the judgment herein.

For the error committed by the court in admitting evidence as hereinbefore stated, the judgment is reversed.

BEATTY, C. J. Until the filing of the supplemental briefs in this case, I had supposed that the constitutionality of the statute commonly known as the Wright act has been definitely settled by the decision of this court in the case of *Turlock Irrigation Dist. v. Williams*, 76 Cal. 360, in which I was one of the counsel employed to defend the validity of the act. I therefore sat at the hearing of this case with the expectation of participating in its decision, but on becoming aware of the fact that the constitutionality of the law was again seriously drawn in question upon all the grounds formerly taken, and upon several others, I concluded that although I might not be disqualified in a strict sense in this particular case, I could not with perfect propriety take part in deciding it, and for that reason express no opinion.

A petition for a rehearing having been filed, the following opinion was rendered thereon on the 13th of January, 1892:—

The COURT. In their petition for a rehearing, appellants have called attention to the fact that in the opinion hereto-

fore rendered the court has failed to pass upon two propositions urged by them in their appeal, and request that if, in the opinion of the court, these propositions are untenable, it be so stated, in order that there may be no occasion for another appeal in which to present them for consideration.

It does not follow from the fact that the propositions were not discussed in the former opinion that they were not fully considered. Because each proposition urged in the briefs of an appellant is not taken up and discussed *seriatim*, it does not follow that they have not all received due consideration. A due regard for the amount of business before the court, and the time allowed for its disposition, compels us to limit the opinions in the several cases to such principles and rules of law as will be a guide to the courts below in disposing of the case upon its return, and a rule of action for the citizens of the state in their subsequent transactions.

The proposition again called to our notice by the appellants in their petition for a rehearing, that the act in question is in violation of the provision of article 11, section 18, of the constitution, prohibiting certain public corporations from incurring indebtedness "without the assent of two thirds of the qualified electors thereof, voting at an election to be held for that purpose," cannot be maintained. This prohibition in the constitution is limited to the public corporations enumerated in that section, viz., "county, city, town, township, board of education, or school district," and, under familiar rules of construction, cannot be extended to any other public corporation. Many of the sections of this article of the constitution include in their provisions "any public or municipal corporation" (secs. 10, 12, 16), while the provisions of section 19 are limited to a "city," and of section 11, to a "county, city, town, or township." In view of the fact that different provisions are made in the constitution for different classes of public corporations, it must be held that the prohibition in section 19 is limited to the corporations which are therein designated. For such other corporations for municipal purposes as under the provisions of section 6 the legislature might by general laws authorize to be incorporated, the constitution has left to the legislature power to provide the terms and conditions upon which an indebtedness may be created, as well as its amount. At the time that the constitution was framed and adopted, there were many other public corporations in the state, such as reclamation and irrigation districts, that had been organ-



ized for many years, and if it had been the intention to subject all such corporations to the prohibition, we must conclude that express language therefor would have been inserted in the constitution. The case of *Harshman v. Bates Co.*, 92 U. S. 569, cited by the appellants, is inapplicable. The constitution of Missouri had required the assent of two thirds of the qualified electors of a "county, city, or town," as a prerequisite to a subscription for building a railroad, and it was held that the legislature could not confer authority upon a "township" to vote a credit for such subscription; that while counties, cities, and towns had a corporate character and organization, a township was only a geographical division of the county; and that the provision of the constitution prohibiting a county from voting such credit could not be evaded by authorizing the several geographical subdivisions of the county to vote such credit.

The fact that the town of Madera is included within the boundaries of the Madera Irrigation District neither renders the act unconstitutional nor invalidates the organization of the district. This principle was discussed and was sustained in *Board of Directors v. Tregea*, 88 Cal. 334. The objection that the land within a town or city cannot be benefited by a system of irrigation, and therefore cannot be taxed for such improvement, proceeds upon an erroneous view of the power of taxation. While the benefit to the land is assumed as the basis of the assessment, still, as was said in *Lent v. Tillson*, 72 Cal. 428, such benefit is not the source of the power. Even though the land is not susceptible of irrigation, yet it may be benefited by the improvement, and should bear its proportion of the burden, upon the same principle that land in a city which can make no use of a sewer or other street improvement is nevertheless deemed to receive a benefit from its construction, and is required to pay a portion of its cost. The object of the act is the improvement of the district as an entirety, and the extent of the district, as well as the lands to be included therein, has been left to be determined by the discretion of the board of supervisors. Whether they have properly or improperly exercised such discretion cannot be investigated by the courts. The act cannot be declared unconstitutional by reason of any improper exercise of such discretion. Neither is it in violation of the constitution to incorporate into such district a town or city that has been incorporated for other municipal purposes. A system of irrigation contemplated by



the act in question cannot be considered as a "municipal purpose" within the scope of the organization of a city or town, and there can be no conflict between a corporation organized under the act to produce a system of irrigation within the district, and the municipal incorporation of the town of Madera. A water supply for the two corporations is distinct and for different purposes. The liability of the inhabitants of the town of Madera for the bonded indebtedness of the Madera Irrigation District, as well as for that of their own municipality, does not impair the validity of the organization of the district. It is a liability of the same character as rests upon the inhabitants of any town for its proportion of all the indebtedness of the county within which it is situated.

Rehearing denied.

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**LEGISLATURE — POWER OF.** — The power of the legislature to enact laws is restricted or limited only where so expressly provided by the constitution: *People v. Seymour*, 16 Cal. 332; 76 Am. Dec. 521, and extended note; *Thorpe v. Rutland etc. R. R. Co.*, 27 Vt. 140; 62 Am. Dec. 625, and extended note.

**STATUTES — LOCAL LAWS.** — A public local law, if it operates uniformly, and subjects all persons who come within the defined locality to its provisions, is valid: *State v. Moore*, 104 N. C. 714; 17 Am. St. Rep. 696, and note; note to *Allen v. Pioneer Press Co.*, 12 Am. St. Rep. 716.

**LEGISLATURE — DISCRETION OF.** — The legislature may pass such laws as in its discretion are wholesome and for the public good: *State v. Moore*, 104 N. C. 714; 17 Am. St. Rep. 696, and note.

**LEGISLATURE — REVIEW OF DISCRETION BY JUDICIAL TRIBUNAL.** — Where the legislature has declared that the drainage of wet lands is of public benefit, nothing is left to the local tribunal but to decide whether a particular ditch is of public utility, and conducive to the public welfare, and if such ditch will drain any considerable body of wet lands it is of public utility and benefit: *Zigler v. Menges*, 121 Ind. 99; 16 Am. St. Rep. 357, and extended note on the power of the legislature to impose taxes and assessments for local benefit.

**LEGISLATURE — DELEGATION OF AUTHORITY TO MUNICIPAL CORPORATIONS.** See note to *Newgas v. City of New Orleans*, 21 Am. St. Rep. 373. The legislature may establish municipal corporations, and delegate to them any local power which it may constitutionally exercise: *City of Lexington v. McQuillan*, 9 Dana, 513; 35 Am. Dec. 159.

**CONSTITUTIONS — DUE PROCESS OF LAW — WHAT IS.** — Due process of law is the right to a trial according to process and proceedings of common law, through courts of justice: *Rison v. Farr*, 24 Ark. 161; 87 Am. Dec. 52, and note; *Ex parte Grace*, 12 Iowa, 206; 79 Am. Dec. 529, and note.

[IN BANK.]

## DUNLAP v. STEERE.

[92 CALIFORNIA, 344.]

**JUDGMENT BY DEFAULT OBTAINED BY FRAUD—EQUITABLE RELIEF.**—A judgment by default quieting title, obtained upon service of summons by publication, will be set aside in equity, when it appears that the complainant had no knowledge of the pendency of the former action or of the rendition of judgment therein until more than one year after its date, that he was the owner of the land in dispute, and that the defendant in equity knew that the allegations in his complaint in the former action were false, and that he secured an order for service of summons by publication by means of a false affidavit.

**JUDGMENTS.—EQUITABLE RELIEF IS GRANTED WHERE, BY ACCIDENT, MISTAKE, FRAUD, OR OTHERWISE, a party has obtained an unfair advantage in proceedings in a court of law, without negligence on the part of the adverse party, and which must necessarily make that court an instrument of injustice unless the advantage thus gained is restrained.**

**JUDGMENTS OBTAINED BY FRAUD—FALSE AFFIDAVIT—EQUITABLE RELIEF.**—The presentation of a willfully false affidavit, for the purpose of obtaining an order for service of summons by publication, is an act of fraud upon the court; and when the judgment which rests upon such service is itself unconscionable, and was obtained without the knowledge of the defendant therein, it will be set aside in equity.

**JUDGMENTS OBTAINED BY FRAUD AS RES JUDICATA.**—Fraud in obtaining a judgment is not concluded thereby, when the defendant therein had no knowledge of the pendency of the action, could not have protected his rights therein, and his failure to defend was not a negligent omission on his part. In such case he is entitled to equitable relief.

*Wells, Guthrie, and Lee, for the appellant.*

*Chapman and Hendrick, for the respondent.*

DE HAVEN, J. The action is one in equity, and is, in effect, to set aside a former judgment between the parties, wherein the alleged title of the defendant herein to the land described in the complaint was quieted as against all claims of the present plaintiff. The findings of the court below show that this judgment was obtained by default, and upon a service of the summons therein by publication, and that the present plaintiff had no knowledge of the pendency of that action, or of the rendition of said judgment, until more than one year after its date. The court also finds, and the evidence is sufficient to sustain these findings, that in point of fact the plaintiff here was the owner of the property involved in that action, and that not only was the defendant here without title, but that he knew that the allegations of the complaint filed by him for the purpose of obtaining the judgment referred to were wholly false. The question therefore presented is, whether a judg-

ment thus obtained is beyond the reach of successful attack in a court of equity. The legal effect of this judgment, if permitted to stand, is to divest plaintiff of all title to his property, in favor of one who has succeeded, by a compliance with the mere forms of law, in obtaining such judgment, and that, too, without the knowledge of plaintiff, and therefore when it was morally impossible for him to defeat it. We think the plaintiff is entitled to the relief which he asks, not only upon authority, but upon the plainest principles of justice. "In general, it may be stated that in all cases where, by accident, or mistake, or fraud, or otherwise, a party has an unfair advantage in proceedings in a court of law, which must necessarily make that court an instrument of injustice, and it is therefore against conscience that he should use that advantage, a court of equity will interfere, and restrain him from using the advantage which he has thus improperly gained": Story's Eq. Jur., sec. 885. In order to justify the application of this rule, it must appear not only that the judgment against which relief is sought is unjust and unconscionable in itself, but that the person against whom it was rendered was not guilty of negligence in omitting to make his defense in the original action. The facts as found by the court below bring this case fully and clearly within the operation of the rule of equity just cited. In the first place, the defendant practiced a fraud upon the court as well as upon the present plaintiff, in procuring the order for the publication of the summons in the action referred to. Under section 412 of the Code of Civil Procedure, a plaintiff is entitled, under certain circumstances, to procure such an order; but in order to be so entitled, he is required by that section to first present to the court or judge, either in the form of a verified complaint or an affidavit, a statement of facts showing that a cause of action exists in his favor against the defendant. Such an affidavit was presented by the defendant here in the action which resulted in the judgment now sought to be set aside, but it necessarily results from the findings of the court that not only was the defendant's affidavit false in this respect, but that he knew that it was false. An affidavit of this character is always *ex parte*. The absent defendant is not present to impeach it, and if it is sufficient in form, the court cannot disregard it, but is compelled to accept its statements as true, and make the order which is demanded. Under such circumstances, a plaintiff who seeks to avail himself of the statutory mode for a constructive service of summons

must exercise good faith in his representations to the court or judge. He must at least believe that the affidavit which he presents is true. The presentation of a willfully false affidavit for the purpose of obtaining an order for service of the summons for publication is itself an act of fraud; and when the judgment which rests upon it is itself unconscionable, and was obtained without the knowledge of the defendant therein, it should be set aside.

It is claimed, however, that the fraud here complained of is concluded by the judgment itself; that whether the defendant had a good title to the land in controversy was the very matter involved in the former action, and the judgment therein is conclusive upon the plaintiff; and in support of that, the case of *United States v. Throckmorton*, 98 U. S. 61, and other similar cases, are cited. But the rule there announced is only applicable where the former judgment was the result of a trial between the parties, or where the one against whom the judgment was rendered had actual notice of the pendency of the action, and neglected to submit his proofs. The case just mentioned was one in which a retrial of an action which had been once fully tried was asked, and can have no kind of bearing here, where the plaintiff never had his day in court, or any opportunity to make his defense to the false and fraudulent claim upon which the judgment against him was based. Not having any knowledge of the pendency of that action, it was an absolute impossibility for him to protect his rights therein, and his failure to defend was not a negligent omission on his part. It is this difference in the facts which brings the plaintiff here within the protection of the exception to the general rule which was acted upon in *United States v. Throckmorton*, 98 U. S. 61, and the existence of which exception was not only admitted in the opinion of the court in that case, but was afterwards applied in *United States v. Minor*, 114 U. S. 233. In the case of *Adams v. Secor*, 6 Kan. 542, it was held by the supreme court of that state that a judgment based upon a false and fraudulent claim should be set aside, where the defendant therein had only been served by publication, and did not have actual notice of the pendency of the action. In *Tomkins v. Tomkins*, 11 N. J. Eq. 512, the court, while refusing relief upon the facts before it, recognized the justice of relieving a defendant from an unjust judgment obtained without his knowledge. It is there said: "The usual ground upon which a court of equity refuses to interfere with a judgment

is, because the defendant should have protected himself in the court where the judgment was obtained. In a case like the present, of foreign attachment, where the proceeding is *in rem*, and the judgment is obtained without the knowledge of the defendant, and the proceedings are all necessarily *ex parte*, it would be hard indeed if this court could not interpose to protect a party against the fraud of the plaintiff. The propriety of this court's interfering in such cases is too obvious to require its vindication." In the case of *Irvine v. Leyh*, 102 Mo. 200, the supreme court of Missouri state what we deem the true rule to be applied here. After referring to the case of *United States v. Throckmorton*, 98 U. S. 61, and other cases following it, the court say: "The principle thus so strongly stated in the cases cited proceeds upon the ground that the party had an opportunity to appear and interpose the defense in the suit in which the judgment complained of was rendered. The cases before cited are those in which the defendant in the first suit appeared, or had actual notice of the suit, and might have interposed the fraud as a defense. In all such cases the issues made by the pleading, or which might have been made, are justly regarded as settled and merged in the judgment, leaving collateral matters only open to investigation. But in our opinion, the rule of the cases cited cannot be applied in all of its strictness to a case where the defendant has been brought in by newspaper notice only, and had no actual notice of the suit, and as a consequence, had no real opportunity to defend. The rule must be applied to those cases where the reason upon which it is founded admits of its application. But to entitle the plaintiffs to the relief which they asked and procured in the case, it is not enough for them to simply show that Leyh had no valid cause of action against them. They must at least show that the claim was founded upon or conceived in fraud, and that the machinery of the law was resorted to for the purpose of enforcing what was known to be a fraudulent demand." The facts found by the court here fully satisfy the rule as held in the case just cited. That rule, it seems to us, gives to one obtaining a judgment against another without a trial, and without his knowledge, sufficient protection. Its application to the facts of this case must result in an affirmance of the order appealed from.

Appeal from judgment dismissed; order denying motion for new trial affirmed.

BRATTY, C. J., concurring. I concur. It appears that Dunlap was, without any fault of his own, deprived of the opportunity of interposing a perfect defense to the action of *Steere v. Dunlap*; and it is alleged in the complaint herein, and found by the court, not only that the allegations of the complaint in the former action were untrue, but that Steere at the time knew they were false. The evidence is sufficient to sustain this finding, at least so far as the complaint in the former action counted upon a title by prescription; but there is nothing to show that Steere in fact knew that his tax title was void, though such knowledge is by the law imputed to him. The case, then, presents these features: Steere sues Dunlap upon a claim which he knows to be false. He obtains an order for publication of summons, based upon the two grounds that Dunlap has departed from the state, and cannot, after due diligence, be found within the state. His affidavit is in itself sufficient to justify a finding that these grounds exist; and a judgment entered upon Dunlap's default, after publication of summons, is not void, and cannot be set aside upon motion, unless the motion is made within a year: Code Civ. Proc., sec. 463. Can it, then, be annulled by suit in equity after the year? I think it clear, on principle, that in a case where no rights of innocent third parties are involved, a judgment so obtained ought to be set aside, upon the ground that it was fraudulently obtained; the fraud consisting in taking a default judgment upon a claim made in bad faith against a defendant, who, without any fault on his part, is prevented from interposing a perfect defense. The findings of the superior court, therefore, which are supported by the evidence, are themselves sufficient to support the judgment; and the order denying defendant's motion for a new trial should be affirmed.

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Supreme Court Commissioner Vanielief prepared an opinion in Department in this case, which was rejected by the court in Bank, and the foregoing opinion adopted in lieu thereof.

In the opinion prepared by Judge Vanielief, he stated that the purpose of the action was to annul a former judgment of the same court between the same parties, as to the same lots, and to enjoin its execution. He also stated that the court below found that said judgment was obtained by default upon service of summons by publication as required by law; that the affidavit upon which the order for the publication of said summons was procured was defective and untrue in stating that the present plaintiff, Dunlap, had departed from the state, and that, after due diligence, he could not be found therein. Judge Vanielief was of opinion that the findings of the court below were not justified by the evidence. He said: "The only evidence to sustain this find-

ing is the testimony of the plaintiff, Dunlap, to the effect that although he departed from this state in 1879, he returned to Inyo County, in this state, in the spring of 1881, where he openly and publicly resided and worked as a miner and farmer from that time until 1887; that he never, during that time, saw the newspaper in which the summons was published, nor had any actual notice of the publication of summons, or of the pendency of the former suit; that he left Mr. Boyce in charge of the lots when he departed from the state, but did not inform Boyce that he intended to leave, or where he was going; and that he never communicated with Boyce or any other person in Los Angeles County during his absence, until 1887. This testimony has no tendency to prove that the affidavit was not made in good faith. The affidavit is sufficient to show that, 'after due diligence,' Dunlap could not be found 'within the state.' This, with the other facts therein stated, justified the order of publication: Code Civ. Proc., sec. 412; *Forbes v. Hyde*, 31 Cal. 348; *Ligare v. California Southern R. R. Co.*, 76 Cal. 610. The publication of the summons according to the order was service of it upon the defendant, having the same effect as if served by either of the other modes prescribed by the code (Code Civ. Proc., sec. 413, 416), except that in case of service by publication alone, the defendant, on a proper showing, may be allowed to answer to the merits of the action at any time within one year after the rendition of the judgment: Code Civ. Proc., sec. 473. After the expiration of one year, the judgment by default, upon service of summons by publication, is just as conclusive as if it had been rendered upon personal service, and will not be opened or set aside by a court of equity, except on the ground of fraud, accident, mistake, or surprise, by which, without any fault or negligence on his part, the defendant was prevented from making a meritorious defense: *United States v. Throckmorton*, 98 U. S. 68; *Zellerbach v. Allenberg*, 67 Cal. 298; *Amador O. & M. Co. v. Mitchell*, 59 Cal. 179; *Mastick v. Thorp*, 29 Cal. 448; *Boston v. Haynes*, 33 Cal. 32; *Phelps v. Peabody*, 7 Cal. 52. Upon a sufficient affidavit, the court found and determined that the defendant in the former action could not, 'after due diligence, be found within the state,' and so recited in the order of publication. This judicial determination of the fact is conclusive as against the mere testimony of the plaintiff that he was in Inyo County, in this state, at the time the former action was commenced, and when the order of publication was made, and that, in his opinion, personal service might have been made upon him there by the exercise of due diligence. There is no pretense that the plaintiff in the former action knew or had any reason to believe that the defendant was in Inyo County. Nor is there any evidence tending to prove that the acts of diligence stated in the affidavit were not performed, or to show fraud or bad faith on the part of the plaintiff in that action in procuring the order of publication. Nor is there any averment or evidence of any mistake, accident, or surprise, in the legal sense of those terms, by which the plaintiff herein, without fault or negligence on his part, was prevented from making his defense in the former action. That service of summons by publication is proper in an action to quiet title to land in this state was expressly decided in the late case of *Perkins v. Wakeham*, 86 Cal. 580; 21 Am. St. Rep. 67. It follows that, for aught that appears by the record in this case, the former judgment is conclusive evidence that the appellant is the owner of the lots in question, and that the findings of the trial court to the contrary are not justified by the evidence. I think the appeal from the judgment should be dismissed, that the order denying a new trial should be reversed, and a new trial granted."



Judge McFarland, in dissenting, concurred in the opinion prepared by Commissioner Vandelief; and added that, in his opinion, the evidence did not sustain the finding of the lower court, that at the time of the rendition of the former judgment, Steere was not "the owner of the said property, nor any part thereof, and had no right, title, or interest of any sort therein, all of which he well knew." In the former action, Steere alleged ownership, possession, and adverse possession for five years, and relied upon title based on a tax deed, as well as upon adverse possession. In the present action, Dunlap alleges that the only claim which Steere had is founded on such tax deed, which, together with the certificate of purchase which preceded it, is set out in full in his complaint, and shows that it did not convey title because of its own defects and the defects in such certificate. Such "attack upon Steere's deed is at least extremely technical," said Judge McFarland, "and it does not support the finding of fraudulent personal intent against" Dunlap. "And the only other evidence tending to support the said finding relates to Steere's possession, and assuming that it shows a want of adverse possession, there was no warrant for the general finding that he well knew that he had no right or interest of any sort." In the dissenting opinion rendered by Judge Paterson, and in which Judge Garoutte concurred, the ground was also taken that the findings of the lower court, above set forth, were not sustained by the evidence. In order to make the rule announced in the opinion adopted by the court applicable, the evidence must show clearly "that the party charged with fraud deliberately commenced and prosecuted his action with intent to defraud his adversary, knowing that his claim was baseless in law as well as in fact." Judge Paterson, after stating this proposition, contended that the evidence in this case failed to show any action taken by Steere in bad faith; and stated such evidence, in substance, as follows: Dunlap testified that he left one Boyce in charge of the property as his agent in 1878; that he received rent for the property only one year, when he ceased to make inquiries about it, because he had lost the address of Boyce, although the latter resided in the small town of Santa Monica, where the property was situated. Boyce testified that Dunlap left the property in his hands to sell, and in the mean time to collect the rents; that the last time that he saw Dunlap was in January, 1878; "that Steere called upon him several times and inquired very earnestly where Dunlap could be found; that he came to see about getting service on him; that Steere was inclined to push matters, and that he, Boyce, was a little indifferent about the matter; that Steere claimed to have a tax deed for the property, and asked him, Boyce, how soon he could hear from Dunlap, and that he told him he thought he would hear from him in three, four, or five weeks, probably. Milner, under whom Steere claims, paid the taxes on the property for the years 1879-80, 1880-81, 1882-83, 1883-84; and when the defendant purchased from him, he repaid the amount of taxes which Milner had thus paid. Milner's certificate of sale from the tax collector was dated March 4, 1879. The evidence is entirely consistent with the theory of the good faith of Steere in the prosecution of his suit. The circumstances show that he believed himself to be the owner of the land. He paid a valuable consideration for the tax title, and he and his grantor paid the taxes assessed upon the land every year except two after 1878. If he had desired to perpetrate a fraud upon Dunlap, it is not at all probable that he would have importuned Boyce so often to discover the very fact which would have effectually prevented him from making the affidavit, and procuring the order for publication. It is said that it must be presumed he knew his tax deed was invalid. I do not think any such presumption should

be indulged; but if it can, it certainly is not sufficient to convict him of a willful and deliberate attempt to defraud, when it is admitted or appears that he paid a valuable consideration for the tax title, and endeavored in good faith to give the defendant in the action personal notice of the claim set up. The worst construction that can be fairly put upon the conduct of Steere is, that he had a doubt as to the validity of his title, and sought the aid of the court to settle the matter in his favor. This he had the right to do. He knew that plaintiff was claiming through his agent the right of possession, and to collect the rents. There is no evidence that any one ever advised Steere that his tax deed was invalid. Probably not one man in a thousand, outside of the profession, would have known that the deed was void. The question of ownership, and the question whether one has held adverse possession, are questions so mixed with law that a statement in relation thereto by a layman should not be regarded with great strictness."

**EQUITY — RELIEF FROM JUDGMENT OBTAINED BY FRAUD.** — A party can come into a court of equity and obtain relief from a judgment which has been obtained against him by fraud, accident, or mistake when there has been no negligence or fraud on his part: *Brenner v. Alexander*, 16 Or. 349; 8 Am. St. Rep. 801, and note; *Tehan v. Maloy*, 45 N. J. Eq. 68. See *Pico v. Cohn*, 91 Cal. 129; 25 Am. St. Rep. 159, and extended note. But the fraud upon which he may successfully seek relief must be extrinsic or collateral to the questions examined and determined in the original action. Hence fraud, either in committing perjury or in procuring a witness to commit it, is not available as a ground for relief in equity: *Pico v. Cohn*, 91 Cal. 129; 25 Am. St. Rep. 159, and note 165-171.

## KULLMAN v. GREENEBAUM.

[92 CALIFORNIA, 402.]

**FRAUDULENT COMPOSITION WITH CREDITORS — SECRET PREFERENCE.** — A composition agreement between a debtor and his creditors is void if secret payments are made by the debtor or his agent to preferred creditors beyond their *pro rata* share under the agreement; and the rule is the same when such payments are made by friends or relatives of the debtor, with his knowledge, to induce a creditor to sign the agreement, although such payments were not made out of the debtor's assets.

**FRAUDULENT COMPOSITION WITH CREDITORS — VIOLATION OF AGREEMENT.** — A composition agreement is an agreement as well between the creditors as between the creditors and their debtor, by which each creditor agrees to receive the sum fixed by the agreement in full of his debt; and a secret agreement, by which a friend of the debtor undertakes to pay to one of the creditors more than his *pro rata* share, to induce him to unite in the composition, though the debtor is not a party thereto, and his assets are not diminished thereby, is as much of a fraud upon the other creditors as if such agreement was directly between the debtor and such creditor. Such an agreement violates the equity and mutual confidence between the creditors upon which the composition is based, and renders it void.

**CONVERSION OF PLEDGED STOCK.** — Where, in an action to recover for the conversion of stock valued at eighteen thousand dollars, and pledged as

security for a loan of eight thousand dollars, it appears that the principal of the loan was paid at the time of demand and refusal, the pledgee is guilty of conversion, although at that time there was interest to the amount of thirty-seven dollars due on the loan, which was overlooked by both parties, and neither demanded, tendered, nor paid.

**ACTION** to recover the sum of eighteen thousand dollars for the conversion of mining stock valued at that sum, and also to set aside a composition agreement between a debtor and his creditors. Judgment for plaintiffs, and defendants appeal.

*John R. Jarboe, W. S. Goodfellow, and Edward R. Taylor, for the appellants.*

*Waldemar J. Tuska, for the respondents.*

**McFARLAND, J.** The main question in this case is about the validity of a composition deed, by which the respondents and the other creditors of appellants agreed to receive *pro rata* the proceeds of the sale of appellants' assets, and thereupon to release them from all claims and demands. Respondents contend that said agreement is invalid, because a fraudulent preference was given to certain of the creditors who signed it, and the court below so found. The court found as facts that some of the creditors at first refused to sign the agreement, and that, to induce them to sign, "some of the relatives and friends of the defendants did pay such creditors the full amount of their several demands, with the knowledge, but without the direction, of the defendants, and not out of the assets of the said defendants, nor under any promise or expectation of repayment, and thereby did make a preference of such creditors, and induced them to sign the said composition; and that such creditors did receive a larger proportion or sum than secured by said agreement; of all of which facts the plaintiffs, at the time of signing such composition, were ignorant, and upon the discovery thereof notified the defendants," etc.

We think that the ruling of the court below was right, and in line with the current of authorities. The general rule is correctly laid down in Story's Equity Jurisprudence, sec. 378; and we stated it quite fully in the recent case of *O'Brien v. Greenebaum*, 92 Cal. 104. It is strenuously argued by counsel for appellants that the principle does not apply here, for the reasons that the payments to the preferred creditors were not made by the debtors or their agents; and particularly that the payments were not made out of the debtors' assets,—that is, out of the actual and disposable property which they then

had. It is to be noticed, however, that the appellants knew of these secret payments to preferred creditors; and as the utmost good faith is required in such transactions, the appellants can hardly be said to be innocent of the imposition practiced upon respondents. But beyond all that, the rule does not, by any means, rest solely upon the participation of the debtor in the fraud and the diminution of the actual assets. In a composition agreement, each creditor is a party as to each other creditor, as well as to the debtor. "Creditors sign upon the consideration that others sign upon the same terms; and if they are deceived, they are misled into an act to which they might not otherwise have assented": See Story's Eq. Jur., sec. 379, and notes. *Solinger v. Earle*, 82 N. Y. 393, was a case where a brother-in-law (as in the case at bar) had given his note to induce a creditor to sign a composition deed; and in the opinion of the court in that case there is aptly expressed the views which are determinative of the point in question against appellants in the case at bar. The court say: "The agreement between the plaintiff and the defendants, to secure to the latter payment of a part of their debt in excess of the ratable proportion payable under the composition, was a fraud upon other creditors. The fact that the agreement to pay such excess was not made by the debtor, but by a third person, does not divest the transaction of its fraudulent character. A composition agreement is an agreement as well between the creditors themselves as between the creditors and their debtor. Each creditor agrees to receive the sum fixed by the agreement in full of his debt. The signing of the agreement by one creditor is often an inducement to the others to unite in it. If the composition provides for a *pro rata* payment to all the creditors, a secret agreement, by which a friend of the debtor undertakes to pay to one of the creditors more than his *pro rata* share, to induce him to unite in the composition, is as much a fraud upon the other creditors as if the agreement was directly between the debtor and such creditor. It violates the principles of equity and the mutual confidence as between creditors upon which the agreement is based, and diminishes the motive of the creditor who is a party to the secret agreement to act in view of the common interest in making the composition. Fair dealing and common honesty condemn such a transaction."

2. We think that there was sufficient evidence to support the finding of the court that the shares of stock mentioned in

the complaint were deposited by respondents with the appellants as security for certain loans of money made by the latter to the former, and not upon any other account; and that when respondents demanded said stock of appellants, there was due upon said loan account eight thousand dollars, and thirty-seven dollars interest. At the time of the demand, respondents paid to appellants (and the latter received it) the said eight thousand dollars, but nothing was said about the thirty-seven dollars for interest, and it was not paid. And it is now contended by appellants, among other things, that respondents did not establish a technical conversion of the stock mentioned in the complaint, because said thirty-seven dollars was not paid or tendered. But it is evident that the item of interest was overlooked or forgotten by both parties. Appellants did not refuse to deliver the stock because this item of interest was not tendered. They received the eight thousand dollars as the amount due on the loan, and did not demand or call attention to the interest. They delivered to respondents, at the time they received the eight thousand dollars, other stocks, which had been pledged in the same way; and they evidently refused to deliver the stocks mentioned in the complaint because they contended, as they still contend, that they were held upon the stock account as well as upon the loan account. Under these circumstances, and without considering other views presented on the question by counsel for respondents, it is sufficient to say that the item of interest was so small when compared with the eight thousand dollars received, and the eighteen thousand dollars' worth of stock involved, that we are justified in determining the point against appellants upon the maxim, *De minimis non curat lex*.

Judgment and order affirmed.

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**DEBTOR AND CREDITOR—FRAUDULENT COMPOSITION.**—A composition agreement is void as to all innocent parties when there is an agreement between the debtor and one of his creditors whereby the latter is given any preferences over the others: *White v. Kuntz*, 107 N. Y. 518; 1 Am. St. Rep. 886, and note. A composition is invalidated where an attorney secretly secures one of the creditors of his client a sum in excess of the *pro rata* accepted by the other creditors: *Bank of Commerce v. Hoeber*, 88 Mo. 37; 57 Am. Rep. 359, and extended note. A note secretly given by a debtor to one of his creditors for the balance of his debt, to induce him to join in a composition, is void: *Willie v. Morris*, 63 Tex. 458; 51 Am. Rep. 655.

[IN BANK.]

## EX PARTE GORDAN.

[92 CALIFORNIA, 478.]

**CONTEMPT — JURISDICTION — ORDER TO SHOW CAUSE IN PERSON — HABEAS CORPUS.** — Where a party is merely summoned under an order of court to appear in person and show cause why he should not be punished for contempt in failing and refusing to obey a prior order of court, he has the right to appear by attorney. That part of the order commanding him to appear in person is beyond the jurisdiction of the court. If he does so appear by attorney and offers to show cause, an order for his arrest for contempt in not appearing personally is without jurisdiction, and he is entitled to his discharge on *habeas corpus*.

*J. D. Sullivan and James G. Maguire*, for the petitioner.

*Henry I. Kowalsky and T. J. Crowley*, for the respondent.

**McFARLAND, J.** The petition herein is by Solomon Gordan, praying that Robert Gordan may be restored to his liberty.

The facts are as follows: Robert Gordan was plaintiff in an action for divorce against his wife, Elka Gordan. Judgment was rendered in said case in favor of plaintiff therein, on December 8, 1887, granting the divorce, but providing that the infant child of the parties, Leah Gordan, until further order, "be placed in the charge and custody of the grandmother, Sarah Patek, to be by her sustained at the expense of the plaintiff, Robert Gordan."

In January, 1890, the said Sarah Patek filed a petition, in which she stated that Gordan had been paying her twenty-five dollars per month for the support of said child down to November, 1889; that for November and December, 1889, he had not paid anything; and that twenty-five dollars per month was not sufficient. She prayed that the court order him to pay fifty dollars for the two back months, and for the future, forty dollars per month. Gordan answered, and set up various reasons why such order should not be made. After a hearing, the court, on January 25, 1890, ordered him to pay said fifty dollars, and also thereafter to pay said Sarah thirty dollars per month. There seems to have been no further trouble until some time in 1891; but on June 27, 1891, the said Sarah Patek filed another petition, in which she stated that in February, 1891, said Gordan has ceased paying said thirty dollars per month. Whereupon the court made an order, on June 27, 1891, "that said Robert Gordan be and appear in person" before the court on July 3, 1891, to show cause "why he should not be punished for contempt in fail-

ing and refusing to obey " the order requiring him to pay said thirty dollars per month, and " why he should not pay the costs reasonably incurred in this matter." This order was served on Gordan on June 29, 1891, in San Francisco, where he resided, the court making the order being the superior court in and for the county of Solano. On said July 3, 1891, said Gordan appeared in court by his attorney, Herbert Choyanski, who, on behalf of Gordan, offered to file the sworn answer of the latter, and certain affidavits in response to the order to show cause. But the court refused to receive the affidavits, or to hear the proceeding on its merits, because Gordan was not personally present, and because his counsel admitted that when last seen he " appeared to be in good health," and " physically able to attend court." Whereupon the court ordered the sheriff to call the said Gordan at the court-house door, and no response having been made to the call, the court entered an order reciting the said facts, and adjudging that said Gordan was guilty of contempt in not appearing personally in court, and ordering a writ of attachment to issue to the sheriff, commanding him to arrest said Gordan, and hold him in custody until the opening of the court, and then bring him before the court. Pursuant to said order, such writ was issued, and Gordan was arrested; and by virtue of said writ the sheriff claims to hold the said Robert Gordan.

We do not deem it necessary to examine the points made by petitioner, that the original order to pay money to Sarah Patek was invalid because she was not a party to the divorce suit, and that the alleged contempt having been committed, if at all, without the immediate presence of the court, there should have been an affidavit stating the facts constituting the contempt, as provided in section 1211 of the Code of Civil Procedure. The alleged contempt for which Gordan is held in custody is, not the refusal to obey an order requiring him to pay money, but his failure to appear in person in response to the notice to show cause.

In civil proceedings, and even in many criminal proceedings not involving a felony, a party may appear in person or by counsel. Of course, in proper cases, he may be taken under attachment or warrant of arrest; and within certain territorial limits, a person may be compelled to attend court as a witness by the process of subpoena. But in the case at bar, Gordan was merely summoned to appear in court on a certain day, and show cause why a certain thing should not be done.



He appeared on said day by counsel, and offered to show cause. This he had a right to do, and the court should have proceeded to hear and determine the issue before it. That part of the order which commanded him to appear in person the court had no power to make; and the subsequent order for his arrest, for not appearing personally, had no jurisdictional basis.

It is ordered that the said Robert Gordan be discharged from custody.

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**CONTEMPT — RELIEF BY HABEAS CORPUS:** See extended note to *Mullin v. People*, 22 Am. St. Rep. 422; note to *Commonwealth v. Lecky*, 26 Am. Dec. 49.

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## RICHARDS v. GRIFFITH.

[92 CALIFORNIA, 492.]

**LIENS — PRIORITY BETWEEN JUDGMENT AND MORTGAGE LIENS.** — When a second mortgage is given upon express agreement that the first mortgage shall be satisfied with the money advanced, a judgment creditor of the mortgagor whose judgment is docketed before the satisfaction and cancellation of the first mortgage or the recording of the second mortgage, and who subsequently purchases the premises at execution sale under his judgment, without notice of the agreement or nature of the dealings between the parties to the second mortgage, has a lien superior to the rights of the second mortgagee. The latter is not entitled, as against such purchasers, to be subrogated to the rights of the first mortgagee.

**LIENS — PRIORITY OF — SUBROGATION.** — A lien will be kept alive, under some circumstances, in favor of one who has paid the lien-holder, although the latter has satisfied and discharged it of record, but where the equity is a latent one, the lien will not be kept alive to the prejudice of a subsequent *bona fide* purchaser.

*H. V. Reardan*, for the appellant.

*F. C. Lusk, and Gray and Sexton*, for the respondents.

**PATERSON, J.** The court below sustained the demurrer to the complaint, and plaintiff having declined to amend, judgment was entered in favor of the defendants.

It is alleged in the complaint that on November 11, 1884, defendant Bunnell made and delivered to Charles St. Sure a promissory note for the sum of \$700, payable November 11, 1886, and to secure payment thereof executed and delivered to him a mortgage on certain lands, which are described; that on August 25, 1886, the defendants Griffith and Stose recovered and caused to be docketed a judgment against said Bun-

nel for the sum of \$303.26; that on October 21, 1886, Bunnel made and delivered to plaintiff his promissory note for the sum of \$1,200, payable two years after date, and to secure payment thereof he executed and delivered to plaintiff a mortgage on the same property owned by him and described in the St. Sure mortgage; that plaintiff made the loan of \$1,200 to Bunnel upon the express agreement with the latter that the St. Sure mortgage should be satisfied and discharged by said Bunnel out of the sum loaned to him by plaintiff; that thereupon the plaintiff paid St. Sure the amount due on the note which he held against Bunnel (\$904.16), and St. Sure released Bunnel from the indebtedness and canceled the mortgage; that on November 8, 1886, an execution upon the judgment referred to was procured by Griffith and Stose, and that they, at execution sale, after due proceedings, became the purchasers of the land described in the mortgage; that the property was sold at said sale December 11, 1886, for the sum of \$315.60, and on June 23, 1887, no redemption from the sale having been made, the sheriff executed and delivered a deed to Griffith and Stose; that the St. Sure mortgage was recorded August 3, 1885, and the mortgage to plaintiff on the day it was executed.

Upon these facts, plaintiff prayed for a foreclosure of his mortgage, a sale of the property, and payment to him of the amount of \$904.16, with interest thereon from the date of the discharge of the St. Sure mortgage. His contention is, that by virtue of his agreement with Bunnel and the payment and discharge of the St. Sure mortgage, he was subrogated to all the rights of St. Sure, and that the lien which was superior to the lien of the judgment, though changed in form, still subsists.

It will be observed that there is no averment of fraud, accident, or mistake, or of any real or colorable necessity on the part of plaintiff to pay the St. Sure mortgage, in order to protect his own interests. Plaintiff was a mere volunteer party to the transaction. It is not claimed that Griffith and Stose had any notice of the agreement between plaintiff and Bunnel, or of the fact that plaintiff paid off the St. Sure mortgage with money procured from Bunnel. At the time they purchased the land, the St. Sure mortgage was satisfied and canceled of record. Before they were informed of the facts upon which appellant relies for subrogation, they changed their position. They purchased the property in good faith, for a valuable con-

sideration, without notice of appellant's claim that there was a lien superior to their judgment lien. We cannot say whether they would have paid \$316.60, or any other sum, for the property if they had known of plaintiff's claim, but it is sufficient to say, they did change their position before they had any notice of the facts.

We think the learned judge of the court below, in reviewing the authorities, correctly held that this case falls within the principle discussed and applied in *Persons v. Shaeffer*, 65 Cal. 79. It was there held that a lien will be kept alive, under some circumstances, in favor of one who has paid the lienholder, although the latter has satisfied and discharged it of record; but that where the equity is a latent one, the lien will not be kept alive to the prejudice of a subsequent *bona fide* purchaser: See also *Guy v. Du Uprey*, 16 Cal. 196; 76 Am. Dec. 518; *Bunn v. Lindsay*, 95 Mo. 250; 6 Am. St. Rep. 48 (a case very much like this); 2 Pomeroy's Eq. Jur., p. 102, sec. 658.)

The judgment is affirmed.

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**LIENS — PRIORITY.** — In the absence of statutory regulation, common law establishes liens in the order of their acquisition, but the common law has been displaced in many states by statutes awarding to liens priority in the order of their registration: *Voorhis v. Westervelt*, 43 N. J. Eq. 642; 3 Am. St. Rep. 315, and note. A docketed judgment has precedence over a prior unrecorded deed of which the judgment creditor has no notice: *Wilcox v. Leominster Nat. Bank*, 43 Minn. 541; 19 Am. St. Rep. 259, and note.

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[IN BANK.]

## ALEXANDER v. JACKSON.

[22 CALIFORNIA, 514.]

**HOMESTEAD ON LAND HELD UNDER CONTRACT TO PURCHASE.** — One who holds the equitable title to land, under a contract for the purchase thereof, may impress it with a homestead lien the same as if he held the estate in fee, except that it is subject to the claim of the vendor for the unpaid purchase-money; and if such vendee afterwards acquires the estate in fee, under the terms of the contract, the homestead claim will attach thereto, and be superior to any claim to the land which accrued after the declaration of homestead was filed for record.

**HOMESTEAD — TO WHAT TITLE OR INTEREST WILL ATTACH.** — Whatever the character of the title or interest in the land held at the time of filing a declaration of homestead thereon, the homestead right will attach to such title or interest, and whatever may inure to or grow out of that title will be impressed with such right equally with the original title.

**HOMESTEAD UNDER EQUITABLE TITLE—PURCHASER FROM HUSBAND WITH NOTICE TAKES SUBJECT TO.** — Where a wife files a declaration of homestead upon land held as community property by her husband under a contract of purchase, he cannot, by any act in which she does not join, transfer such contract so as to defeat the homestead claim. The husband holds such contract in trust for the community, for the purpose of perfecting the title; and if he transfers it to a purchaser with notice of the homestead claim, the latter will take it subject thereto; and if he obtains a conveyance in fee from the original vendor, he holds the land subject to the claim of homestead by his vendor's wife.

**HOMESTEAD UNDER CONTRACT OF PURCHASE—LIABILITY OF, FOR PURCHASE-MONEY—PURCHASER FROM HUSBAND TAKES SUBJECT TO—SUBROGATION—FORFEITURE OF CONTRACT.** — Where a wife files a declaration of homestead on community property held by her husband under a contract of purchase, he holds as her trustee to perfect the title, and a purchaser from him alone, with notice of the homestead claim, holds subject to the homestead. After such purchaser has received a conveyance from the original vendor, he is subrogated to his rights under the contract so as to be entitled to receive the amount of purchase-money paid by him before he can be compelled to convey to the wife of his vendor; but before he can put her in default for the non-payment of such purchase-money, he must make a demand upon her therefor, and notify her of his relation to the property, and of his intention to claim a forfeiture under the original contract; and a mere demand by him for the possession of the premises will not put her in such default.

**VENDOR AND PURCHASER—CONTRACT OF SALE—WAIVER OF FORFEITURE.** — A provision for the forfeiture of a contract for the sale of land for the non-payment of the purchase-money at a certain time is waived by the subsequent execution of a deed to the vendee or his assignee by the original vendor.

**VENDOR AND PURCHASER—CONTRACT OF SALE—FORFEITURE—DEMAND AND NOTICE.** — When time is not made of the essence of a contract for the sale of land, it is incumbent upon the vendor or his assignee, who would terminate the contract and insist upon a forfeiture, to give notice to the vendee, and a reasonable time within which to do any act required of him. In such case, a mere failure to pay the purchase-money at maturity will not *ipso facto* avoid the agreement; but the vendor must give notice of his intention to forfeit it after demand and refusal to make the required payment.

*Wright and Hazen, for the appellant.*

*L. J. Maddux, for the respondents.*

**HARRISON, J.** The defendant W. A. Jackson, in the year 1884, purchased from Charles Crocker the property described in the complaint, for the sum of \$150, paying a portion of the price, and taking from him an agreement for a conveyance upon the payment of the remainder in two equal payments within six and twelve months thereafter. In September of that year Jackson erected a dwelling-house, and made other improvements upon the land, at a cost of about thirteen hundred dol-

lars, and upon the completion of the house, the defendants, with their children, moved into the house, and have since occupied it as their home. The money paid for the purchase of the lots and the construction of the dwelling-house was the community property of the defendants, and on August 12, 1885, the defendant Mary duly executed and acknowledged a proper declaration of homestead upon said land and dwelling-house, and on the same day filed it for record in the office of the county recorder of said county. Jackson made a further payment on account of his purchase from Crocker, in October, 1885, and took from him a new agreement providing for the payment of the remainder in thirty days; and on February 8, 1886, he paid a still further sum, and took an agreement providing for the payment of the remainder in thirty days from that date. Each of these agreements contained the following clause: "If paid as above stated, with three dollars as cost of conveyance, the above-named W. A. Jackson will be entitled to a deed for the above-described lots; otherwise this agreement becomes null and void, and the amounts now paid shall be forfeited. If forfeited, the said W. A. Jackson shall thereafter be, and he hereby consents to be, tenant of Charles Crocker, liable to be dispossessed upon three days' notice." At the time the last agreement was given him, there was unpaid upon the contract price of the lots the sum of \$47.21. October 6, 1887, the plaintiff made an agreement with the defendant W. A. Jackson for the purchase of said dwelling-house and improvements for the sum of fifteen hundred dollars, less such an amount as was to be paid to Crocker upon the agreement for the conveyance of the land, and at the same time Jackson made the following indorsement upon the agreement of February 8, 1868, viz.:—

"I hereby surrender and relinquish all claims to receive a conveyance of the within property to W. H. Alexander, and authorize him to take and demand the conveyance therefor in his own name.

"Dated Modesto, October 6, 1887.

"W. A. JACKSON";

and delivered the same so indorsed to the plaintiff, receiving from him one hundred dollars as part payment for the improvements. A few days thereafter the plaintiff presented the agreement, with the indorsement, to Crocker, and received from him a conveyance of the land, paying him the balance on said purchase price, amounting at that date to \$40.21, and

on the 28th of October placed the deed on record in the county recorder's office. On the 3d of November, 1887, the plaintiff paid to Jackson the further sum of \$325, and executed to him his promissory note for \$1,000, with a mortgage upon the property to secure its payment, thus completing the payment of the \$1,500 under his agreement for the purchase of said improvements. Immediately after, he demanded possession of the land and premises from the defendants, which was refused, and in May, 1888, commenced this action in ejectment to recover possession thereof. The defendant Mary had no knowledge or notice of the plaintiff's right or title to the land and premises until November 6, 1887. and at the time of his demand for the possession, repudiated any interest of his therein.

The defendant Mary has alone made answer to the complaint, and alleges therein her claim of homestead, and the invalidity of her husband's assignment of the agreement to the plaintiff. It does not appear whether the defendant W. A. Jackson was ever served with the summons in the action or not, but the court found that he refuses to make answer to plaintiff's complaint, or to join with defendant Mary in making answer thereto. The action was tried by the court without a jury, and judgment was rendered against plaintiff, and in favor of the defendant Mary alone. From this judgment the plaintiff has appealed upon the judgment roll.

Upon the execution of the contract of sale by Crocker to Jackson on the 8th of February, 1886, the latter became vested with the equitable title to the land, and thereafter Crocker held the legal title to the land in trust for Jackson, to be conveyed to him upon the payment of the remainder of the purchase price. The estate in the land thus conveyed was subject to be impressed with the lien of a homestead as fully as an estate in fee. The declaration of homestead thereon was subordinate to the rights or claim of Crocker, but upon the ripening of the equitable estate into a fee by a conveyance to Jackson of the legal title, in accordance with the terms of the agreement, the homestead claim would attach to the fee and be superior to any claim to the land which accrued after the declaration of homestead was filed for record. The Civil Code does not require a person who desires to make a declaration of homestead to have a fee in the land, or any particular title thereto. "The homestead consists of the dwelling-house in which the claimant resides, and the land on which the same is situated, as in this title provided": Sec. 1237. "From and

after the time the declaration is filed for record, the premises therein described constitute a homestead": Sec. 1265. Whatever be the character of the title or interest in the land held at the time of the filing of the declaration, the claim will attach to such title or interest, and whatever may inure to or grow out of that title will be impressed with the lien equally with the original title: *Moore v. Reaves*, 15 Kan. 150; *Stinson v. Richardson*, 44 Iowa, 373; *McKee v. Wilcox*, 11 Mich. 359; 83 Am. Dec. 743; *McCabe v. Mazzuchelli*, 13 Wis. 478; *Thompson on Homesteads*, secs. 170-172.

After the declaration of homestead had been filed by Mary, her husband could not, by any act in which she did not join, transfer the estate created by the contract with Crocker, and upon which the homestead claim had been impressed. The instrument by which the estate was created was not itself the estate in the land, but the evidence by which that estate was manifested, and in accordance with whose terms such estate could be ripened into a fee. This instrument, being in the name of Jackson, was, after the declaration of homestead was filed, held by him in trust for the community for the purpose of perfecting the title to the land represented thereby, and without any right by his individual assignment thereof to alienate the estate which it represented. The statute has conferred upon the wife, as well as the husband, the right to create a homestead out of the community property, and when the wife has made the declaration, the husband is bound by its effect as fully as though the declaration had been made by himself. Although Jackson had the opportunity, by reason of the instrument being in his name, to make a transfer of the right to receive a conveyance from Crocker by mere indorsement upon the instrument, yet the effect of such transfer to the plaintiff, who took it with full knowledge of the circumstances under which Jackson had held it, and of the rights of defendant Mary in the land which it represented, was to render it, in the hands of the plaintiff, subject to the same trust as it was in the hands of Jackson, and make him a trustee thereof for the same purposes as was Jackson.

The court finds that at the time of the assignment to the plaintiff, and long prior thereto, the "plaintiff had full actual knowledge and notice of said declaration of homestead, and that defendant Mary claimed and occupied the premises as a homestead"; and that on the sixth day of October, 1887, the plaintiff made the agreement with Jackson for the purchase



of the dwelling-house and improvements on the land, and that on that day Jackson made the transfer of the agreement hereinbefore set out; and that "the plaintiff never received any assignment or made any contract for the purpose of cheating said defendant Mary out of her homestead." Assuming, then, as we must from these findings, that the transaction between Jackson and the plaintiff was in good faith towards the defendant Mary, and that the plaintiff received the transfer of the Crocker agreement with full knowledge that the land therein described was impressed with the homestead claim, and was charged with knowledge of the law that such homestead, or the means by which the title to the land was held, could not be alienated by Jackson alone, we must hold that the plaintiff became in equity merely the custodian of the right to obtain the deed, and that when he received the deed from Crocker, he held the legal title to the land thereby conveyed in trust for the Jacksons according to their rights, and subject to the homestead claim of the defendant Mary.

The court does not find that the plaintiff ever made any purchase of the land from Jackson, but that they merely "made an agreement for the purchase and sale of said dwelling-house and improvements," and it appears from the findings that Jackson did not, by the terms of his assignment of the contract, attempt to transfer to the plaintiff any right to the land, the assignment itself being but the equivalent of an authority to the plaintiff to receive from Crocker in his own name the deed provided for therein. Viewing these transactions in the light of the circumstances under which they were had, and considering that they were had without any purpose to deprive the defendant Mary of her homestead, we can only say that the good faith under which the plaintiff then acted, as well as all principles of equity, will prevent him from saying now that he thereby acquired any estate in the land which he can hold adversely to her, or that his relation to her is other than that of a trustee of the estate so acquired by him.

The respondent Mary was not, however, by virtue of such relation, entitled to demand that the plaintiff should immediately make a conveyance to her of the land. Although he held the land in trust for the defendants, as above stated, still, it was subject in his hands to the same superior claim for the unpaid amount of the purchase-money that it was in the hands of Crocker, and until that claim had been satisfied, Mary could not demand a conveyance from him. The plaintiff

could not, however, assume a hostile relation to her until after she had herself renounced her obligation to discharge this claim.

The provision for a forfeiture at the maturity of the time fixed in the agreement for such payment had not been enforced by Crocker, and his subsequent execution of the deed to plaintiff was a recognition by him that such forfeiture had been waived. If it should be conceded that that provision was not extinguished by his failure to avail himself of it at the time it accrued, yet it could not afterwards be enforced without a demand for payment on his part, and a refusal on the part of Jackson: *Armstrong v. Pierson*, 5 Iowa, 317. "A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created": Civ. Code, sec. 1442. When time is not made of the essence of the contract, it is incumbent upon the party who would terminate the contract to give notice to the other, and a reasonable time within which to do any act required on his part, before he can be absolved therefrom. By the terms of the agreement with Jackson, Crocker had a right, in case of non-payment, to declare the agreement null and void, and the previous payment forfeited. Mere failure to make the payment did not *ipso facto* make the agreement void, except at the option of Crocker, and such option must have been expressed by proper notice to Jackson. The plaintiff could not enforce this claim assigned to him by Crocker upon any other terms than could Crocker, and his failure to make a demand for the payment left the agreement still in force.

The plaintiff obtained the deed from Crocker, October 15th, and "immediately after November 3d," that is, as early as November 4th, made a demand upon the defendants for the possession of the premises. No demand was made by him for the purchase price, nor did he give any notice that he elected to treat the agreement at an end. Considering the relation which he bore to the defendants in respect to the title to the land held by him for them, he was not, at the time of his demand for the possession, or at the commencement of this action, entitled thereto. The fact that when he made such demand the defendant Mary repudiated his title is immaterial. She did not, until the 6th of November, have any knowledge that he had any interest in the premises, or was entitled to receive the unpaid portion of the purchase-money, and after she had such knowledge, no demand was made upon her. It

was incumbent on him, in order to put her in default, to inform her of his relation to the property, and his failure to do so took from her repudiation of his claim all significance.

At the trial of the cause, the equitable defense presented in the answer was considered by the court, and many transactions between the plaintiff and the defendants not presented by the answer were incorporated by it into its findings. It is evident that the parties presented to the court their respective rights to the premises without much regard to the form of the pleadings, and that the judgment of the court was based more upon the facts disclosed at the trial than upon the issues presented for trial. In its judgment, the court directs that the defendant Mary pay to the plaintiff the balance of the purchase price on the lots in question, but makes no direction to the plaintiff respecting a conveyance thereof. There is no averment in her answer of any offer by her to pay to the plaintiff this amount of money, and the plaintiff commenced his action without making any demand therefor. Unless the judgment should direct a conveyance from the plaintiff, upon the payment of the money for which he holds the title as security, the payment by Mary would still leave the question of title to the premises unsettled.

Considering the entire case as presented by the record, we are of the opinion that complete justice can be best administered to all parties by reversing the judgment and directing a new trial, with leave to the parties to amend their pleadings as they may be advised, and it is so ordered.

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PATERSON, J., dissented, and claimed that as the plaintiff Alexander, as the grantee of Crocker, became vested with the legal title to the land and all of Crocker's rights under the contract to enforce it as against the Jacksons, his demand for the possession of the premises alone was sufficient notice to them that he claimed a forfeiture on account of their failure to pay him the balance of the purchase price, which he had paid to Crocker. In this connection Judge Paterson said: "If Crocker had made a demand for possession of the premises, it would have been the clearest kind of a notice that he claimed a forfeiture on account of a failure to pay the balance of the purchase price. It then would have been the duty of the defendants, if they desired to avoid the forfeiture, to immediately, or as soon as they could do so, tender the amount remaining unpaid. The same duty was owing to plaintiff, the grantee of Crocker. His demand was a proper one to make, and was unmistakable proof of his claim of forfeiture, and the right to possession under the terms of the contract: *Pomeroy on Specific Performance*, sec. 393; *Doe v. Birch*, 1 Mees. & W. 402; *Dendy v. Nicholl*, 4 Com. B., N. S., 376. Instead of offering to pay the balance due, as she ought to have done, Mrs. Jackson "repudiated any right, title, or interest of plaintiff in or to said premises, and

refused and ever since has refused to deliver the same, and no offer has been made by defendants or either of them to pay plaintiff the balance of the purchase price. "Under the contract, payment of the purchase price was a condition precedent. The parties intended — and their intention is expressed in clear language — that the fee should not pass until the purchase-money was fully paid. Before defendant Mary can claim a deed or the right to retain the possession given under the contract, she must pay the purchase price. She cannot claim under the contract, and at the same time repudiate it. The legal title is in plaintiff. He paid a valuable consideration for it, and if the defendants, or either of them, have any defense to his claim for the possession, it must be an equitable defense. One who asks the interposition of a court of equity between himself and the owner of the legal title must show that he is not in fault. That he who seeks equity must do equity, and do it promptly, is a rule especially applicable to contracts of this kind, and particularly in this state: *Green v. Covilland*, 10 Cal. 324; 70 Am. Dec. 725. Defendant Mary had notice of plaintiff's claim as early at least as November 4, 1887, and had full notice of his rights two days later. This action was not commenced until May 8, 1888. The court finds that each of the defendants was at all times able to pay the balance of the purchase price. Neither of them offered to do so. Six months had passed before plaintiff commenced this action. In view of the fact that no tender of the balance had been made up to that time, it is not likely that a court of equity, after such delay without excuse, would have relieved the defendant Mary from the forfeiture that had been incurred, even if she had offered, in her answer, to pay the balance and all costs that had been incurred by the plaintiff; but not only was no such offer made, but she still repudiates the claim of the plaintiff, and, so far as the record shows, still denies that he has any interest in the property, or that the defendants owe him any duty. To entitle a party who is in default, under such circumstances, to relief, it must appear that he has promptly and in good faith offered to do what his contract required him to do, and neither infancy nor ignorance of his rights is a sufficient excuse: *Pomeroy's Eq. Jur.*, sec. 452; *Conrad v. Lindley*, 2 Cal. 175; *Steele v. Branch*, 40 Cal. 11; *Grey v. Tubbs*, 43 Cal. 364; *Hicks v. Lovell*, 64 Cal. 18, 20; 49 Am. Rep. 679; *Marshall v. Means*, 12 Ga. 68; 56 Am. Dec. 444; *Cross v. Carson*, 8 Blackf. 138; 44 Am. Dec. 742; *McClartey v. Gokey*, 31 Iowa, 509; *Jones v. Robbins*, 29 Me. 353; 50 Am. Dec. 593; *Wells v. Smith*, 2 Edw. Oh. 83; *Hancock v. Carlton*, 6 Gray, 58, 59. The indulgence or non-action of the plaintiff from the time he demanded possession until the commencement of this action cannot be taken as a waiver of the forfeiture: *Kerns v. McKean*, 65 Cal. 416. 'The vendor is not bound to wait indefinitely after the failure of the purchaser to comply with the terms of his agreement. If the payments are not made when due, he may, if out of possession, bring his ejectment, and recover possession': *Central Pac. R. R. Co. v. Mudd*, 59 Cal. 590." The lower court adjudged and decreed "that defendant Mary Jackson pay to plaintiff the sum of \$47.21, balance of purchase price paid on the lots involved, with interest on the same at seven per cent per annum from date hereof." Of this Judge Paterson says: "In this I think the court erred. There is no power in a court of equity to grant relief on a ground not claimed, and on which one of the parties has not had an opportunity to be heard. The question whether defendant Mary should be relieved from the forfeiture was not in issue, and the court could not consider it: *People's Bank v. Mitchell*, 73 N. Y. 415. Even where evidence was given of an offer to pay the full amount due after the action was commenced, this court held that it was new matter which ought to have been

pleaded: *Hegler v. Eddy*, 53 Cal. 599. . . . As additional evidence of the injustice of allowing the defendants, after such conduct, to tender to plaintiff the balance of the purchase price, and require him to convey the legal title to them, it appears from the record that the plaintiff paid the full value of the property to Jackson, and that the latter and his wife have ever since remained in possession of the property. The record does not show affirmatively that the defendant Mary has had the benefit of the money paid by plaintiff to her husband; but as the money paid was community funds, and they have always lived together, it must be presumed that they enjoyed it jointly."

**HOMESTEAD ON LAND UNDER CONTRACT TO PURCHASE.** — Homestead may be claimed in land which the party in possession is under contract to purchase: *McKee v. Wilcox*, 11 Mich. 358; 83 Am. Dec. 743. As to what title is necessary or sufficient to support a homestead, see extended note to *Pryor v. Stone*, 70 Am. Dec. 344; *Blue v. Blue*, 38 Ill. 9; 87 Am. Dec. 267. One who purchases land and pays part of the purchase-money becomes thereby entitled to a homestead therein: *Dortch v. Benton*, 98 N. C. 190; 2 Am. St. Rep. 331, and note.

**VENDOR AND PURCHASER — BREACH OF CONTRACT TO PURCHASE.** — A vendor can be deprived of his right to recover damages for a breach of a contract to purchase only by some act constituting a waiver: *Allen v. Mohn*, 88 Mich. 328; 24 Am. St. Rep. 126, and note.

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## ROBINSON v. EASTON, ELDRIDGE, & Co.

[98 CALIFORNIA, 80.]

**VENDOR AND PURCHASER. — AGREEMENT BETWEEN A LAND-OWNER AND ANOTHER PERSON, BY WHICH THE LATTER IS AUTHORIZED,** within a time designated, to sell certain real property and to retain for his commission whatever shall be realized over a price named, creates a relation between the parties more like that of vendor and purchaser than that of principal and agent, and any sale agreed to be made by the latter must be regarded as made in the capacity of vendor, and not as on account of the land-owner.

**VENDOR AND PURCHASER. — LAND-OWNER HAS NO RIGHT TO A DEPOSIT PAID ON ACCOUNT OF A SALE** of his land when such sale is made by one who has been given the right to sell the land and retain the proceeds in excess of a sum named, and the sale was upon the express condition that the deposit was to be returned, and the sale canceled, if a title insurance company should refuse to insure the title, and such company had so refused after examining such title, though after such refusal, and after the contract of sale had been canceled, it determined to insure the title.

**ACTION** against Easton, Eldridge, & Co., a corporation, to recover moneys received by it on account of the sale of plaintiff's land. Judgment for the defendant.

*J. T. Rogers*, for the appellants.

*A. C. Ellis*, for the respondent.

HARRISON, J. The plaintiffs executed to the defendant the following instrument: —

“We hereby authorize Easton and Eldridge, for us, and within five days from date hereof, and until this authority is canceled in writing by us, to sell for the sum of \$10 000 — net dollars — the following described property, situated in the city and county of San Francisco, state of California, to wit: ‘All of block 935, outside lands; and we will pay said Easton and Eldridge a commission of all over said sum of \$10,000, net, for which they may sell said property with our consent.’

“Witness our hand and seal this twenty-fourth day of August, A. D. 1887.

“C. B. HOBSON.

“C. H. ROBINSON.”

Thereafter, on the same day, the defendant bargained with one Z. S. Eldridge for the sale of the land at the price of \$10,500, upon the condition that the title to the property would be insured by the Title Insurance Company, and received from him \$1,050 as a deposit, agreeing to return the same in case the insurance company would not insure the title, giving to him the following receipt: —

“SAN FRANCISCO, August 24, 1887.

“Received of Z. S. Eldridge the sum of one hundred dollars, being deposit on purchase of block 935, outside lands. Price agreed upon, ten thousand five hundred dollars (\$10,500) in gold coin. Thirty days allowed for search of title, and if title is found imperfect and cannot be made good, said deposit will be returned.

“EASTON, ELDRIDGE, & Co., Agents.”

A similar receipt for \$950 was given the next day.

The Title Insurance Company refused to insure the title, and thereupon, before the expiration of the thirty days, viz., September 6th, the defendant repaid the deposit to Eldridge. The plaintiffs commenced this action to recover from the defendant the money paid it by Eldridge, upon the theory that the money so paid was received by the defendant in its capacity as agent of the plaintiffs, and was their money in its hands the moment it was received from Eldridge. The court rendered judgment in favor of the defendant, from which, and an order denying a new trial, an appeal has been taken.

The relation of the defendant to the plaintiffs was not that of a mere agent. While its authority to sell the land was derived from the plaintiffs, yet the sale was to be made for its

own account and benefit, as well as for that of the plaintiffs. Although the authority to sell was not so coupled with an interest as to create in the defendant an interest in the land, or to prevent the plaintiffs from revoking the authority, yet by the terms of the authorization the defendant acquired such a right to a portion of the proceeds of sale as to enable it to make a contract of sale upon terms of its own choosing. The plaintiffs, in effect, gave to the defendant an option for five days to endeavor to sell the block of land for whatever sum it could obtain, and upon whatever terms it might make, provided they should receive therefor the sum of ten thousand dollars, and agreed that defendant should have whatever sum it could realize therefor above that amount. The relation thus created between them was rather that of a vendor and purchaser under a contract of sale than one of principal and agent, and a sale by the defendant thereunder was in the capacity of a vendor upon its own account, and not for the account of the plaintiffs. Inasmuch as the defendant was entitled to all the proceeds of the sale in excess of ten thousand dollars, it had the right to make the sale upon such terms as in its judgment would enable it to realize the highest price for the land. Upon a sale by it the plaintiffs were entitled to the immediate payment of the ten thousand dollars, but the defendant could sell the land either for cash or upon time, as it might choose, and its terms of sale did not require ratification by the plaintiffs.

Even if it be conceded that the defendant was but the agent of the plaintiffs, their right to recover from it the money paid by Eldridge was no higher than the right of the defendant to retain the money from Eldridge; and its right to refund the money to him was co-extensive with the obligation created by the agreement under which it had been paid. If the agreement with him was contrary to the terms of the authority conferred by the plaintiffs, it could not be enforced against them, and they could enforce it against Eldridge only in case they ratified the act of the defendant; but a ratification of that act subjected them to all the terms of the agreement. The agreement between the defendant and Eldridge was conditioned upon the approval of the title by the Title Insurance Company, and by the terms of that agreement the money received from him was to be refunded in case the Title Insurance Company did not approve the title. Upon the disapproval of the title by that company, Eldridge had the right to demand, and the defendant had the right to refund, the



money that had been received by it as a deposit upon the sale. *Ex parte White, In re Nevill*, L. R. 6 Ch. 397, is illustrative of the principles applicable to the present case. Goods had been consigned by Towle & Co. to Nevill for sale, and if sold, to be accounted for at a fixed price. Nevill sold the goods upon such terms and at such prices as he chose, and it was held that the moneys received by him upon such sales, and standing to his credit upon the books of his banker, were his own moneys, and did not belong to Towle & Co.; that the contracts of sale made by Nevill were made by him on his own account, and not as agent for Towle & Co., the court saying: "The business which Nevill carried on with the goods of Towle & Co. has been called a cotton agency business, and the word 'agency,' in its *prima facie* sense, seems to imply the relation of principal and agent, and not of vendor and purchaser. But it has been admitted in the course of the argument, that there is no magic in the word 'agency.' It is often used in commercial matters where the real relationship is that of vendor and purchaser, and the question is, whether the dealings between Mr. Nevill and Messrs. Towle & Co. with reference to these goods resulted in the relationship of vendor and purchaser, or in the relationship of principal and agent." "If the consignee is at liberty, according to the contract between him and his consignor, to sell at any price he likes, and receive payment at any time he likes, but is to be bound, if he sells the goods, to pay the consignor for them at a fixed price and a fixed time, in my opinion, whatever the parties may think, their relation is not that of principal and agent. The contract of sale which the alleged agent makes with his purchasers is not a contract made on account of his principal, for he is to pay a price which may be different, and at a time which may be different, from those fixed by the contract": Page 403. We think that the rule there laid down should control in the present case.

The objection of the plaintiffs to the letter from Grimwood was properly overruled. It had already been received in evidence, without objection, during the testimony of the plaintiff Hobson. Neither did the court err in refusing to admit the evidence offered by the plaintiffs, that subsequent to the repayment to Eldridge of the deposit, the Title Insurance Company did insure to the plaintiffs the title to the land. It was not controverted that the agreement on the 24th of August between Eldridge and the defendant was made upon the con-

dition that that company would insure the title, or that the company did thereafter refuse to insure it. Its subsequent agreement to insure the title to the plaintiffs would not defeat the effect of its prior refusal to insure it to Eldridge.

The judgment and order denying a new trial are affirmed.

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THE PRINCIPAL CASE, while it arose out of a contract of a class not at all unusual in its character, is apparently a pioneer case, for we cannot acknowledge the supposed relevancy of the single decision cited by the court. That decision, if applicable to contracts relating to real estate, apparently requires those courts which consider themselves as bound by it to regard the property authorized to be sold as the property of the person authorized to sell it, rather than as the property of its owner, and to determine that the owner is not entitled to the proceeds of the sale of his property. Doubtless there are many cases in which an owner of personalty may place it in possession of another with power to sell it, and may so conduct himself as to be bound by any sale made by his agent; but we cannot conceive that this can be true of real estate, the title to which stands of record in the name of its owner, especially where the authorization to sell it is in writing, disclosing the names both of the principal and the agent, and the terms on which the latter may act for the former. In the principal case, the writing authorized the defendant to act for the plaintiffs, and the contract made by it purported to be made by it as "agents." We are therefore unable to appreciate the suggestion of the court that this contract, made under the written delegation of authority to defendant, was made by it as principal rather than as agent. It is true that the mode of compensating defendant for its services was to permit it to retain all the purchase-money above the sum specified; but this mode of ascertaining compensation did not, in our judgment, either modify or extend the authority otherwise conferred on defendant, nor destroy, as between the parties, the relation of principal and agent.

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## GRIMMER v. CARLTON.

[98 CALIFORNIA, 122.]

CONTRACT IS NOT UPON A CONSIDERATION SUFFICIENT TO SUPPORT IT when such consideration is an agreement to do acts the doing of which cannot be specifically enforced.

DEED BASED ON NON-ENFORCEABLE CONSIDERATION. — Deed made in consideration that the grantor, an aged woman, in feeble health, should be supported and maintained for the balance of her natural life by her daughter, the grantee, is upon a consideration not enforceable, and therefore insufficient in law, and the deed will be canceled by a court of equity at the instance of the grantor.

SUFF to cancel a deed made by the plaintiff to the defendant. Judgment for plaintiff.

*W. H. L. Barnes and W. H. Layson*, for the appellant.

*William B. Hardy*, for the respondent.

FOOTE, C. This action was brought to cancel a deed made by Mrs. Grimmer, the plaintiff, to her daughter, Mrs. Carlton. The case comes here upon the judgment roll alone.

From the pleadings it appears that the main issues are two: 1. Whether or not the deed had been obtained by the fraud and misrepresentations of the defendant; 2. Whether or not the true consideration for the making and delivery thereof was expressed in the deed; and if not so expressed, if it, as set out in the pleadings, was an enforceable contract and sufficient to support the deed.

The court found in favor of the defendant as to the issue of fraud and misrepresentations, but found for the plaintiff, that the true consideration was not stated in the deed; that it was a consideration based upon a verbal agreement that the defendant, in consideration of the making and delivery of the deed, would support and maintain her mother, the plaintiff, for the balance of her natural life, and, in effect, that such, a proposed consideration, not being enforceable, was no consideration at all; and adjudged, therefore, that the deed should be canceled, and the defendant enjoined from selling the property described in the deed, which it is alleged she intended to do. From that judgment this appeal is taken.

Taken altogether, we see no conflict in the findings, and no error in that respect. Nor do we perceive that the court erred in giving judgment upon the findings for the plaintiff.

The proposed consideration, as the true and only consideration, if any existed, mentioned therein, is found to be no consideration in the sense, as we understand the findings, that the agreement upon which it was based was not an enforceable contract, and therefore the deed should be canceled. The findings also negative, by finding what the true consideration was, the existence of any other to support the deed.

But it is claimed that by the admissions of the answer to the cross-complaint it is shown that the contract to maintain and support the plaintiff was partially performed.

We do not think this position correct. The answer to the cross-complaint specifically denies that there was any such agreement made as the latter pleading sets up; and if that is denied, the fact set out in it, that the plaintiff was supported by the defendant, if admitted by the pleadings, is not an admission that it was in pursuance of the agreement the existence of which is denied.

Conceding, without deciding, that the agreement may not

be within the statute of frauds, because it appears that the time for the performance of the defendant's contract to maintain and support depends upon the contingency of the death of the plaintiff, which might or might not happen within a year, under the rule laid down in *Swift v. Swift*, 46 Cal. 269, nevertheless we do not think the contract an enforceable one, because from the very nature of it a proper performance thereof involved the personal services of the defendant.

The findings show that the plaintiff is a person eighty-four years of age, feeble in health, subject to the ailments and disorders incident to old age, and her memory seriously impaired.

The proper maintenance and support of the mother by her daughter ought necessarily to involve the personal care and attention of the latter to such a sick, ailing, and feeble-minded parent. It would doubtless be also the most important and necessary part of the proposed maintenance and support of an almost helpless parent, a female, too, peculiarly to be attended to by a loving and devoted daughter.

And it would be strange indeed if, in addition to a house and lot worth six thousand dollars, — almost all the mother possessed in the way of property, — the filial affection of the child would not stimulate and cause her to consider such services as included in the contract and so intended by the party to be charged, and that the same would be so understood by the party with whom it was made.

The validity of the deed depends upon the power to enforce the specific performance of the defendant's mutual and dependent contract. As it could not be enforced under the rule laid down in *Cooper v. Peña*, 21 Cal. 409, and *King v. Gildersleeve*, 79 Cal. 509, we think the court below was warranted in giving its judgment on the findings made, and we advise that the judgment be affirmed, there being no prejudicial error disclosed by the record.

VANCLIEF, C., and FITZGERALD, C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment is affirmed. —

TO SUSTAIN A DEMAND FOR THE SPECIFIC PERFORMANCE OF A CONTRACT, it is generally essential that there be mutuality of remedy; or in other words, that each of the parties have the right to compel the other to perform it. A party against whom redress by specific performance cannot be successfully sought cannot himself successfully seek it: *Cooper v. Peña*, 21 Cal. 409; *Rogers v. Saunders*, 16 Me. 92; 33 Am. Dec. 635; *Sterling v. Klepeattle*, 24 Ind.

94; 87 Am. Dec. 319; *Bodine v. Glading*, 21 Pa. St. 50; 59 Am. Dec. 749. The principal case was not, however, a suit for specific performance, and therefore we know not why the law of specific performance was applied to it; and our ignorance is not enlightened by reference in the opinion of the court to any authority or reason in support of the view which the court appeared to entertain, — that a contract should be declared void because it cannot be specifically enforced. The suit was to cancel a conveyance, on the alleged ground that it was obtained by fraud; and thereupon the court found, as a reason for canceling it, a ground which the complainant may well be pardoned for not having thought of, viz., that the agreement, which was the consideration of the deed, could not be specifically enforced, and therefore that the deed was without any consideration sufficient to support it. According to this decision, if our publisher should convey us a tract of land in consideration of our agreement to edit a volume of these reports to the best of our skill, he might at once pursue us in a court of equity for having perpetrated a fraud on him in procuring the conveyance in consideration of our agreement, because no court would undertake to compel us to edit anything; and he might obtain a decree canceling his conveyance, though we were willing to render the services as agreed. But for the principal case, there is no reason for thinking that such is the law. An agreement to do any act or series of acts which the promisor, but for his agreement, was under no obligation to perform, has ever been deemed an ample consideration for any contract, transfer, or conveyance, whether the doing of such act or acts could be specifically enforced or not: *Cobb v. Cowdery*, 40 Vt. 25; 94 Am. Dec. 370; *Hartnell v. Saunders*, 49 Mo. 433; 8 Am. Rep. 136; *Gould v. Banks*, 8 Wend. 562; 24 Am. Dec. 90; *Lawrence v. Gayetty*, 78 Cal. 126; 12 Am. St. Rep. 29; *Hamer v. Sidway*, 124 N. Y. 538; 21 Am. St. Rep. 693; *Lindell v. Rokes*, 60 Mo. 249; 21 Am. Rep. 395; *Devecmon v. Shaw*, 60 Md. 199; 9 Am. St. Rep. 422; *Smith v. Allen*, 5 Allen, 454; 81 Am. Dec. 758.

The principal case is in direct conflict upon this subject with *Keener v. Keener*, 34 W. Va. 421.

## BALL v. RAWLES.

[98 CALIFORNIA, 222.]

**MALICIOUS PROSECUTION.** — TO ENTITLE PLAINTIFF TO RECOVER in an action for his malicious prosecution, he must show that such prosecution on the part of the defendant was malicious and without probable cause.

**MALICIOUS PROSECUTION.** — THE EXISTENCE OF PROBABLE CAUSE for a prosecution is always a matter of law to be determined by the court. If the facts are undisputed, the court must order a nonsuit, or direct a verdict for the defendant if they constituted probable cause, and if they did not, then that the other issues must be submitted to the jury. When the facts are contradicted, they must be passed upon by the jury before the court can determine the issue of probable cause, but in either contingency, the question is still one of law, to be determined by the court from the facts established in the case.

**MALICIOUS PROSECUTION — PROBABLE CAUSE, QUESTION OF, HOW SUBMITTED.** — Probable cause is in the nature of a judgment, to be determined by the court upon a special verdict of the jury, and is not to be rendered until after the jury has given its verdict upon the facts by which it is to be determined. It is not necessary that the facts be found in the form of a

special verdict. The court may instruct the jury to render their verdict for or against the defendant, according as they shall find facts designated, which the court may deem sufficient to constitute probable cause.

**MALICIOUS PROSECUTION — PROBABLE CAUSE — INSTRUCTIONS DEFINING. —**

It is not competent for the court to give to the jury a definition of probable cause, and instruct them to find for or against it, according as they may determine that the facts are within or without that definition. It must instruct the jury upon this subject in the concrete, and not in the abstract, and must not leave to that body the office of determining the question, but must itself determine it, and direct the jury to find its verdict according to such determination. The court should group, in its instructions, the facts which the evidence tends to prove, and then instruct the jury that if such facts be established, there was or was not probable cause, as the case may be, and that their verdict must be accordingly.

**MALICIOUS PROSECUTION. — ACTIONS FOR MALICIOUS PROSECUTION HAVE NEVER BEEN FAVORED,** and are not sustainable, unless the prosecution was actuated by malice, and the party instigating it had no good reason to believe that the law had been violated, and did not act in good faith upon his reasonable belief that the accused was guilty of the offense for which he was prosecuted.

**MALICIOUS PROSECUTION — PROBABLE CAUSE — BELIEF. —** If the prosecutor does not in fact believe the accused to be guilty, the defense of probable cause cannot exist. It is not sufficient that the known facts are such as to create a belief of the guilt of the accused in the mind of an impartial, reasonable man, if they did not create such belief in the mind of the prosecutor.

**MALICIOUS PROSECUTION — PROBABLE CAUSE — QUESTION FOR JURY. —** Whether a prosecutor believed the accused guilty of the crime charged is a question of fact to be submitted to the jury.

**MALICIOUS PROSECUTION — PROBABLE CAUSE — ADVICE OF MAGISTRATE. —** If the prosecutor, before instituting a prosecution, fully and fairly stated the facts and circumstances to a justice of the peace, and was advised by him that they constituted a reasonable cause for the arrest of the plaintiff, and he honestly acted in good faith under such advice, no action can be sustained for the prosecution. So held, where the facts stated to the justice were confessedly true, but he was in error in thinking that they constituted a criminal act for which it was proper to issue a warrant of arrest.

**LABEL — PRIVILEGED COMMUNICATION. —** A complaint filed in a court of competent jurisdiction, charging the commission of a supposed crime, is, by the code of California, a privileged communication, for which, though false, the complainant cannot be made answerable in a civil action.

**ACTION** for malicious prosecution, brought by the plaintiff, a minor, acting by his guardian *ad litem*. The complaint stated, or attempted to state, two causes of action, the first of which alleged the malicious prosecution of the plaintiff by charging him, as the owner and keeper of a building, with allowing and participating in an illegal game. The second cause charged that the defendant, in a reckless manner and with malicious intent, had presented a complaint before a court which had

no jurisdiction in the matter, by which the plaintiff was accused, as owner and keeper of a store, with allowing and participating in a game of chance, to wit, shaking dice for chances in prizes having a monetary value; that by such accusation the defendant intended that all persons who saw or heard of it should understand and believe, and they did so understand and believe, that the plaintiff allowed and participated in a game prohibited by the Penal Code of the state. The court sustained a demurrer on the last cause of action. By the evidence it appeared that the plaintiff was the manager of a store; that at such store there was a shaking of dice for certain prizes; that the defendant went to the office of a justice of the peace, and he and the justice examined the Penal Code of the state with reference to gambling games; that the defendant stated the facts to the justice as they existed, and the latter told him that they constituted a violation of the code, and therefore that a public offense had been committed. An affidavit was then drawn, charging the commission of the acts the existence of which the defendant had stated to the justice, and a warrant of arrest was issued thereon; but when the accusation came on for trial, the matters therein stated were determined not to constitute a public offense, and the accused was discharged. The building in which was the store of which plaintiff was manager had been leased by the defendant to J. B. Hunt. The plaintiff sought to have this lease received in evidence, together with evidence tending to prove that the defendant wished it annulled; but this evidence, on objection, was excluded by the court as immaterial. Verdict and judgment for the defendant; plaintiff appealed.

*J. T. Rogers*, for the appellant.

*T. L. Carothers*, for the respondent.

HARRISON, J. Action against the defendant for a malicious prosecution in causing the arrest of the plaintiff upon a criminal charge.

At the request of the defendant, the court instructed the jury: "If the jury believe from the evidence that the defendant had probable cause to believe that the plaintiff was guilty of the offense charged against him, then it is not material whether the defendant was actuated by proper motives or improper motives in instituting the criminal proceedings against the plaintiff. To authorize a recovery in this class of cases, it must appear that the defendant was actuated by malice, but



the jury must further believe from the testimony that the defendant had no probable cause or no reasonable ground to believe that the plaintiff was guilty of the offense charged against him; and the court further instructs the jury that probable cause means reasonable ground of suspicion, supported by circumstances in themselves sufficiently strong to warrant a reasonably cautious man in the belief that the person accused is guilty of the offense charged.

"I instruct you, that to entitle the plaintiff to recover, you must find from the evidence that the prosecution complained of was commenced by the defendant through malice, and also that it was without probable cause; and if the plaintiff has failed to show, by a preponderance of evidence, either of these propositions, the jury should find for the defendant."

In giving these instructions, the court committed error, for which a new trial should have been granted. The error was not obviated by the fact that the court, at the request of the plaintiff, instructed the jury that if they should find from the evidence "that the defendant, in swearing out the warrant and causing the arrest of the plaintiff, did not believe that plaintiff was guilty of any crime, and that he did not have sufficient knowledge, as a cautious and prudent man, acting conscientiously and impartially, to believe the plaintiff guilty of any crime, then, as a matter of law, there was no probable cause for the arrest and prosecution of plaintiff," and also, that if they should find from the evidence a certain state of facts, which were enumerated, those facts would not constitute a probable cause.

These were not the only facts of which evidence regarding probable cause had been given to the jury, and the above instructions given at the request of the defendant left to the jury the function of determining this question. The court should have told the jury, either that the evidence which was introduced was or was not sufficient to establish a probable cause, or that, as from the evidence they should find the facts which, in the opinion of the court, would or would not be sufficient to show a probable cause, their verdict should be for or against the defendant.

In order to maintain an action for malicious prosecution, the plaintiff must establish malice on the part of the defendant, and also a want of probable cause. Malice is always a question of fact for the jury, but whether the defendant had or had not probable cause for instituting the prosecution is

always a matter of law to be determined by the court. If the facts upon which the defendant acted are undisputed, the court, according as it shall be of the opinion that they constituted probable cause or not, either will order a nonsuit (or direct a verdict for the defendant), or it will submit the other issues to the jury; but whether admitted or disputed, the question is still one of law, to be determined by the court from the facts established in the case. If the facts are controverted, they must be passed upon by the jury before the court can determine the issue of probable cause; but the question of probable cause can never be left to the determination of the jury. "What facts and circumstances amount to probable cause is a pure question of law. Whether they exist or not in any particular case is a pure question of fact. The former is exclusively for the court, the latter for the jury": *Stone v. Crocker*, 24 Pick. 84. "When there is no dispute about the facts, the question of the want of probable cause is for the determination of the court; where the facts are controverted or doubtful, whether they are proved or not, belongs to the jury to decide; or in other words, whether the circumstances alleged are true is a question of fact; but if true, whether they amount to probable cause is for the court": *Bulkeley v. Keteltas*, 6 N. Y. 387. Probable cause is in the nature of a judgment to be rendered by the court upon a special verdict of the jury, and is not to be rendered until after the jury has given its verdict upon the facts by which it is to be determined. It is not, however, necessary that the facts be found by the jury in the form of a special verdict. The court may instruct them to render their verdict for or against the defendant, according as they shall find the facts designated to it which the court may deem sufficient to constitute probable cause. But it is necessary for the court, in each instance, to determine whether the facts that they may find from the evidence will or will not establish that issue. Neither is it competent for the court to give to the jury a definition of probable cause, and instruct them to find for or against the defendant according as they may determine that the facts are within or without that definition. Such an instruction is only to leave to them in another form the function of determining whether there was probable cause. The court cannot divest itself of its duty to determine this question, however complicated or numerous may be the facts. It must instruct the jury upon this subject in the concrete, and not in the abstract, and must

not leave to that body the office of determining the question, but must itself determine it, and direct the jury to find its verdict in accordance with such determination. The court should group in its instructions the facts which the evidence tends to prove, and then instruct the jury that if they find such facts to be established, there was or was not probable cause, as the case may be, and that their verdict must be accordingly.

Actions for malicious prosecutions have never been favored in law, although they have always been readily upheld when the proper elements therefor have been presented. They are sustained, however, only when it is shown that the prosecution was in fact actuated by malice, and that the party instigating it had no reasonable ground for causing the prosecution. It is for the best interests of society that those who offend against the laws shall be promptly punished, and that any citizen who has good reason to believe that the law has been violated shall have the right to cause the arrest of the offender. For the purpose of protecting him in so doing, it is the established rule, that if he have reasonable grounds for his belief, and act thereon in good faith in causing the arrest, he shall not be subjected to damages merely because the accused is not convicted. This rule is founded upon grounds of public policy, in order to encourage the exposure of crime, and when the acts of the citizen in making such exposure are challenged as not being within the reason of the rule, the court, as in every other case involving considerations of public policy, must itself determine the question as a matter of law, and not leave it to the arbitrament of a jury. And as a violation of law is never to be presumed from an act which is innocent in itself and in accordance with public policy, even though injury result therefrom, it is incumbent on him who would impeach the good faith of such act to make proof of his charge before the other is called upon to defend his conduct.

Originally an action of this character was an action on the case in the nature of a writ of conspiracy, in which the plaintiff in the declaration charged the defendant with having falsely and maliciously caused his arrest. The defendant, in his plea, set forth the grounds of his suspicion under which he caused the arrest, the sufficiency of which was determined by the court upon a demurrer to the plea: *Chambers v. Taylor*, Cro. Eliz. 900; *Coxe v. Wirrall*, Cro. Jac. 193; Com. Dig., tit. Pleader, 2, K; *Wear v. Wells*, 3 Bulst. 284. In process of

time a change was effected in the manner of pleading the cause of action, by which the plaintiff anticipated this plea by averring in the declaration a want of probable cause (*Savil v. Roberts*, 1 Salk. 13; 1 Ld. Raym. 374), and the facts were presented under the general issue; "yet the rule of law that the question belongs to the judge only, and not to the jury, is not, by such alteration in the pleading, in any way impaired": *Panton v. Williams*, 2 Q. B. 193. In the argument of Kelly for plaintiff in error in this case will be found an interesting account of the history and development of the rule by which this question is held to be always a matter of law, and never to be determined by the jury. *Johnstone v. Sutton*, 1 Term Rep. 545, is also a leading case on this subject, having been determined in the court of exchequer chamber, and afterwards affirmed in the house of lords: 1 Brown Parl. C. 76.

The change in pleading by transferring to the declaration the averment of a want of probable cause, although it imposed upon the plaintiff the necessity of making proof of this negative averment as a part of his cause of action, did not, however, change the issue from one of law to one of fact; for unless such want of probable cause was proved by him, it became the duty of the court to determine as matter of law that he had no cause of action against the defendant; and since such probable cause is a legal conclusion to be drawn from the facts, and its absence is an essential element to the plaintiff's right of action, it is at all times to be determined by the court whether the facts proved constituted such probable cause, just as under the original system the court determined upon the demurrer to the facts set up in the defendant's plea whether there were sufficient grounds for his suspicion. In *Panton v. Williams*, 2 Q. B. 192, the question depended upon the consideration of a combination of circumstances and facts, together with inferences to be drawn from them; and Lord Denman left it to be determined by the jury, to which direction counsel for the defendant excepted, and insisted "that his lordship was bound to state to the jury what facts, if proved, would amount to probable cause, leaving to them only the question whether they believed the evidence adduced in order to prove such facts," and the court in exchequer chamber sustained the exception, saying (p. 192): "Upon this bill of exceptions we take the broad question between the parties to be this: whether, in a case in which the question of reasonable or probable cause depends, not upon a few simple facts,

but upon facts which are numerous and complicated, and upon inferences to be drawn therefrom, it is the duty of the judge to inform the jury that if they find the facts proved and the inferences to be warranted by such facts, the same do or do not amount to reasonable or probable cause, so as thereby to leave the question of fact to the jury, and the abstract question of law to the judge. And we are all of opinion that it is the duty of the judge to do so." And after stating that such had always been held to be the rule of law in ordinary cases, said further: "And such being the rule of law where the facts are few and the case simple, we cannot hold it to be otherwise where the facts are more numerous and complicated. It is undoubtedly attended with greater difficulty in the latter case to bring before the jury all the combinations of which numerous facts are susceptible, and to place in a distinct point of view the application of the rule of law according as all or some only of the facts, and inferences from facts, are made out to their satisfaction; but it is equally certain that the task is not impracticable, and it rarely happens but that there are some leading facts in each case which present a broad distinction to their view without having recourse to the less important circumstances that have been brought before them."

In *Bulkeley v. Keteltas*, 6 N. Y. 387, the court held that it was error to leave to the jury to determine whether the circumstances proved in evidence did or did not establish a want of probable cause. When this cause was again tried in the superior court, the judge instructed the jury that if they should find that the defendants had reasonable grounds for believing that the plaintiff swore as had been charged (the plaintiff having been arrested upon a charge of perjury), that would establish a want of probable cause; but the court at general term (*Bulkeley v. Smith*, 2 Duer, 261) held this instruction erroneous, saying that, "from the terms in which it was expressed, it necessarily involved the submission to the jury of the question of probable cause, and was not limited to the facts upon which the question depended. The judge instructed the jury that they were to consider and determine whether the facts and circumstances known to the defendants were reasonable grounds for their believing that the charge which they made against the plaintiff was true, and we are unable to make a distinction between the existence or non-existence of reasonable grounds of belief, and the existence or want of a probable cause. There is a difference in the form

of expression, but none in the meaning, since the existence of reasonable grounds for believing a charge to be true is in reality nothing more than a legal definition of a probable cause for making it. In deciding that there were no reasonable grounds of belief, a jury, of necessity, decides that there was a want of probable cause. The charge of the judge, therefore, amounted to no more than the definition which the law gives of probable cause, and permitted the jury, in the exercise of their own judgment, to apply the definition to the facts of the case; that is, permitted them to determine whether the facts, which they might consider to be proved, did or did not amount to a want of probable cause." In *Grant v. Moore*, 29 Cal. 644, the court (p. 272), upon the ground that the facts were controverted, conflicting evidence to be weighed, and credibility of witnesses to be passed upon, left to the jury to decide whether or not there was probable cause for the prosecution of the suit; and the supreme court, in holding that this action was erroneous, said (p. 653): "The law makes it the duty of the judge who tries an action for malicious prosecution to instruct the jury that as they may find and determine certain questions of fact properly submitted to them to be true or untrue, so must be their verdict for the plaintiff or for the defendant; not that they should determine the question of the want of probable cause, or the contrary. It may sometimes be difficult to state to the jury what the testimony is, and what facts, if found to be true, establish the plaintiff's allegation of want of probable cause; but, difficult as it may be, this duty is cast on the judge in this kind of actions, because he is presumed to know much better than the jury can what facts show the existence of probable cause or the want of it." In *Bulkeley v. Smith*, 2 Duer, 261, the court said: "If the facts upon which the question of probable cause depends are rendered doubtful by the evidence, the court must instruct the jury that if the facts shall be found by them in a certain manner, they do or do not amount, as the case may be, to a want of probable cause, and consequently will or will not entitle the plaintiff to the verdict which he seeks. If, instead of such a direction, he leaves it to the jury to determine not only whether the facts alleged by the plaintiff are true, but whether, if true, they prove a want of probable cause, he abjures his own functions, and commits a fatal error." In *Harkrader v. Moore*, 44 Cal. 152, the court said: "When the facts in reference to the alleged probable cause are admitted



or established beyond controversy, then the determination of their legal effect is absolute, and the jury are to be told that there was or was not probable cause, as the case may be. When, however, the facts are controverted, and the evidence is conflicting, then the determination of their legal effect by the court is necessarily hypothetical, and the jury are to be told that if they find the facts in a designated way, then that such facts when so found do or do not amount to probable cause; but in neither case are the jury to determine whether or not the established facts do or do not amount to probable cause": See also *Eastin v. Bank of Stockton*, 66 Cal. 125; 56 Am. Rep. 77; *Fulton v. Onesti*, 66 Cal. 575; *Bacon v. Towne*, 4 Cush. 217; 1 Saund. 230, note 4.

2. The court also, at the request of the defendant, gave the jury the following instruction: "I instruct you that to justify an arrest on a criminal charge, it is not required that a crime shall in fact have been committed. If the facts which come to a person's knowledge are such as to create a belief that a crime has been committed by the person charged, in the mind of an impartial, reasonable man, this would be sufficient to constitute probable cause for making an arrest, although no crime had in fact been committed."

Inasmuch as the question of probable cause is always to be determined by the court from the facts in each particular case, it would seem unnecessary to give to the jury any definition of the term, or any instruction upon abstract propositions relating to this subject. These abstract rules will guide the court in determining the question, but are apt to lead the jury away from their function of passing upon the effect of the evidence in support of the probative facts which the court may direct them to find in order to determine in which way their general verdict shall be rendered.

As a principle of law, this instruction was erroneous in omitting to include therein the further element that the defendant did in fact believe that a crime had been committed by the plaintiff. The circumstances in themselves might be such as ordinarily to create such belief in the mind of a person, yet the defendant might not have that belief, for the reason that he had knowledge of other facts or circumstances which would destroy such belief. While it is not necessary to show that the crime has in fact been committed, it is necessary to show not only that the defendant had reasonable ground to believe, but that he did in fact believe, that the crime had been



committed, and that the plaintiff had committed the crime. Although the question of probable cause, as we have seen above, is a question of law, yet the belief of the defendant in a state of facts is itself a fact which it is proper to submit to the jury for its consideration; and whenever the good faith of the defendant, or his knowledge or belief in an existing state of facts, is an element in determining whether there was probable cause, the court should submit that question to the jury, as well as the other facts which, in its opinion, bear upon that issue. "The prevailing law of reasonable and probable cause is, that the jury are to ascertain certain facts, and the judge is to decide whether those facts amount to such cause; but among the facts to be ascertained is the knowledge of the defendant of the existence of those which tend to show reasonable and probable cause, because without knowing them he could not act upon them, and also the defendant's belief that the facts amounted to the offense which he charged, because otherwise he will have made them the pretext for prosecution, without even entertaining the opinion that he had a right to prosecute. In other words, the reasonable and probable cause must appear, not only to be deducible in point of law from the facts, but to have existed in the defendant's mind at the time of his proceeding": *Turner v. Ambler*, 10 Q. B. 260. See also *Harkrader v. Moore*, 44 Cal. 152; *Bacon v. Towne*, 4 Cush. 239; *Woodworth v. Mills*, 61 Wis. 61; 50 Am. Rep. 135; *Fagnan v. Knox*, 66 N. Y. 525; *Delegal v. Highley*, 3 Bing. N. C. 950; 2 Greenl. Ev., sec. 455; Starkie on Slander and Libel, \*472.

3. It was not error for the court to instruct the jury that the plaintiff could not maintain the action if the defendant, before instituting the prosecution, fully and fairly stated the facts and circumstances to the justice of the peace, and was advised by him that they constituted reasonable cause for the arrest of the plaintiff, and he honestly and in good faith acted under such advice. Whatever may be the rule in other states, it was held in this state, in *Hahn v. Schmidt*, 64 Cal. 284, that the advice of a justice of the peace, upon the facts stated to him by the complainant that a crime had been committed, and upon which he issued a warrant of arrest, is sufficient to exonerate the complainant from liability for the arrest. Similar rulings have also been made in *Sisk v. Hurst*, 1 W. Va. 53; *Teal v. Fissel*, 28 Fed. Rep. 351; *Newman v. Davis*, 58 Iowa, 447; and in England, in the cases cited in *Hahn v. Schmidt*, 64 Cal. 284.

4. The court properly excluded from evidence the lease from the defendant to Hunt. It was not relevant to any issue before the jury, and could not be considered by them for the purpose of determining the motive of the defendant in causing the arrest of the plaintiff. For the same reason the court properly excluded the offer on the part of the plaintiff to show that the defendant was anxious to have the lease annulled. The reason which the plaintiff urges as grounds for its admission, viz., that the defendant was anxious to have the lease forfeited, and instituted this action for the purpose of ascertaining whether there were any grounds upon which such forfeiture could be shown, is only a conjecture, and in no wise connected with the arrest, and could not be considered by the jury.

5. The demurrer to the second count in the complaint was properly sustained. There can be no action for injury to character when the publication by which the injury is claimed to have been sustained is privileged. Section 47 of the Civil Code declares that "a privileged communication is one made, — . . . . 2. In any legislative or judicial proceeding, or in any other official proceeding authorized by law."

The effect of this provision is to make a complaint in a court of justice which has jurisdiction of the offense charged an absolute privilege, for which the complainant is not liable in a civil action: *Hollis v. Meux*, 69 Cal. 625; 58 Am. Rep. 574. If the complainant in such proceeding makes a false accusation, the remedy therefor is to procure his indictment for perjury, but he cannot be made liable for damages in a civil action.

The publication charged in this count of the complaint was a criminal complaint made by the defendant before a justice of the peace, and presented in the justice's court of Anderson township, county of Mendocino. If the matters set forth in that complaint constituted a crime, the justice's court had jurisdiction to entertain the complaint: Code Civ. Proc., sec. 115; and it is only upon the theory that such facts did constitute a crime that the complaint can be held to be an injury to the plaintiff's character.

The judgment and order denying a new trial are reversed.

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**MALICIOUS PROSECUTION — MALICE — PROBABLE CAUSE.** — To sustain an action for malicious prosecution, there must be a concurrence of malice and want of probable cause: *Coleman v. Allen*, 79 Ga. 637; 11 Am. St. Rep. 449.

and note; note to *Antcliff v. June*, 21 Am. St. Rep. 546; *Fenstermaker v. Page*, 20 Nev. 290; *Girot v. Graham*, 41 La. Ann. 511.

**MALICIOUS PROSECUTION — PROBABLE CAUSE WHEN QUESTION FOR COURT.** — In an action for malicious prosecution, where the facts are undisputed, and but one inference can be drawn, the question of probable cause is one of law: *Hamard v. Flury*, 120 N. Y. 223; see note to *Boeger v. Langenberg*, 10 Am. St. Rep. 327.

**MALICIOUS PROSECUTION — MALICE — PROBABLE CAUSE — QUESTION FOR JURY.** — In malicious prosecution, malice is a question of fact for the jury: *Reisan v. Mott*, 42 Minn. 49; 18 Am. St. Rep. 489, and note. When, in an action for malicious prosecution, the facts are in dispute, the question of probable cause is one for the jury after the court has properly defined it: *Gulf etc. Ry Co. v. James*, 73 Tex. 12; 15 Am. St. Rep. 743; *Simmons v. Brinkmeyer*, 72 Cal. 486.

**MALICIOUS PROSECUTION — PROBABLE CAUSE — WHAT IS.** — Probable cause consists of a belief in the fact or charge alleged, based on sufficient circumstances to reasonably induce such belief in a person of ordinary prudence in the same situation: *Boeger v. Langenberg*, 97 Mo. 390; 10 Am. St. Rep. 322, and note; *Ross v. Innis*, 35 Ill. 487; 85 Am. Dec. 373, and note.

**MALICIOUS PROSECUTION — ADVICE OF COUNSEL AS PROBABLE CAUSE.** — A letter from the prosecuting attorney authorizing the prosecution is admissible in evidence as tending to show probable cause: *Thurston v. Wright*, 77 Mich. 97; *Gilbertson v. Fuller*, 40 Minn. 413. The subject of malicious prosecution is considered in a monographic note in 26 Am. St. Rep. 127, and the principal case is referred to, and to some extent criticised, at page 146.

[IN BANK.]

## PEOPLE v. HOLLADAY.

[98 CALIFORNIA, 241.]

**PUBLIC SQUARE.** — A map of the pueblo lands of the city of San Francisco, on which a tract of land was designated as a public square, operated as a dedication of such land to public use when the map was approved by an ordinance of such city, and the ordinance was ratified by an act of the legislature, and an act of Congress was passed granting to the city all right, title, and interest of the United States in such land.

**JUDGMENT, EFFECT OF, UPON AFTER-ACQUIRED TITLE.** — Title acquired after issue is joined, not put in issue by a supplemental pleading, is not affected by any judgment which may be rendered in the action; and where the issue upon which plaintiff relied for a recovery was with reference to the dedication of the land sued for as a public park, and the court found that such dedication had not taken place, and therefore gave judgment for the defendant, such finding and judgment cannot preclude a recovery by the same plaintiff upon title acquired after the issue was joined in the first action.

**JUDGMENT QUIETING PLAINTIFF'S TITLE AGAINST A MUNICIPAL CORPORATION,** when the question litigated was whether or not the property in controversy had been dedicated to public use as a park, and the judgment declares that the defendant has no right, title, or interest in the land, is

conclusive in a subsequent action that such land had not been dedicated to such use.

**JUDGMENTS — MUNICIPAL CORPORATIONS, WHEN REPRESENT THE PEOPLE. —**

Municipal corporation having full power and jurisdiction over the public squares within its limits, with a right to sue and be sued, is authorized to maintain and defend all actions relating to its right to subject to the public use squares and land claimed by it to have been dedicated for such purposes, and in any action brought or defended by it, it represents the people of the state for the purpose of preserving the public rights of which it is the trustee.

**MUNICIPAL CORPORATIONS ARE, FOR MANY PURPOSES, BUT DEPARTMENTS OF THE STATE,** organized for the more convenient administration of certain powers belonging to the state, and in their management and control of streets and parks within their limits, and in actions for the vindication and preservation of the public rights therein, exercise a part of the sovereignty of the state.

**MUNICIPAL CORPORATION IS AUTHORIZED, IN AN ACTION CONCERNING LAND CLAIMED BY IT** to be a public square, to put in issue the alleged rights of the people to the use of such square, and the people of the state are bound by the result of the litigation if it is not collusive.

**ACTION TO QUIET TITLE IS A PROPER PROCEEDING AGAINST A MUNICIPAL CORPORATION** to determine its claim that it holds the legal title to land in trust for the people of the state, and that the same has been dedicated to the use of the public.

**ESTOPPEL. — JUDGMENT AGAINST A MUNICIPAL CORPORATION,** in an action brought by it to recover land which it claimed to hold in trust for the people of the state, and that the same had been dedicated to the public use, where the action could have been defended only by showing that the people of the state were not entitled to maintain such action, in effect determines the rights of the people of the state, and is conclusive against them.

**JUDGMENT AGAINST A CITY IS BINDING UPON THE STATE AND THE PEOPLE THEREOF,** when the question was concerning land which the city claimed to hold in trust as a public park dedicated to public use as such.

**JUDGMENT, THOUGH CLEARLY ERRONEOUS, IS CONCLUSIVE** as an estoppel.

*S. W. and E. B. Holladay, Mastick, Belcher, and Mastick, John R. Jarboe, and R. H. Lloyd, for the appellants.*

*William Matthews, Craig and Meredith, John H. Durst, John L. Love, and Attorney-General W. H. H. Hart, for the respondent.*

**DE HAVEN, J.** This is an action brought by the attorney-general, in behalf of the people of the state, upon the relation of one Bryant. It is alleged in the complaint that the land therein described was lawfully dedicated to public use as a public square on March 11, 1858, by the name of Lafayette Park, and that defendants have erected buildings and fences thereon, thereby obstructing the public in the use of the same as a square, and judgment is asked to the effect that such

buildings and fences constitute a nuisance, and that defendants be enjoined from maintaining or continuing the same, or from otherwise obstructing the people of the state in the free use of said land for the purpose for which it was dedicated. In their answer, the defendants deny that the land described in the complaint was ever dedicated to public use as a square, and also allege that on November 16, 1863, the plaintiff herein, upon the relation of one Bohen, commenced an action against S. W. Holladay, one of the defendants herein, and through whom the other defendants claim; that in said action the same identical matters alleged in this complaint were in issue, and judgment therein was finally rendered against this plaintiff, and in favor of defendant Holladay. It is also particularly averred, as a separate defense, that in said action one of the material issues was, whether the land here in controversy was ever dedicated to the public as a square, and that this issue was found and adjudged against plaintiff. The answer further alleges, as a separate defense, that on December 17, 1864, the defendant S. W. Holladay commenced an action against the city and county of San Francisco, to quiet his title as against all adverse claims of said city and county to the land in controversy, and that judgment was therein given to the effect that said Holladay was the owner of an undivided nineteen twentieths of said land, and his title thereto was quieted as against the said city and county; and in this connection it is further alleged that one of the material issues tried in that action, and determined adversely to the present claims of the plaintiff herein, was, whether the land in controversy had ever been dedicated to the public use as a square, and whether said city and county held the legal thereto in trust for the people of the state. The present action was tried by the court without a jury, and findings filed to the effect that the matters alleged in the answer of defendants were true, and judgment was thereafter entered for the defendants. Subsequently the court granted plaintiff's motion for a new trial, and from this order the defendants appeal.

The land in controversy is within the corporate limits of the city of San Francisco as defined by the act of the legislature of this state of April 15, 1851: Stats. 1851, p. 157; and all the right and title of the United States thereto were, by section 5 of the act of Congress of July 1, 1864, to expedite the settlement of titles to lands in the state of California (18 U. S.

Stats. at Large, 332), "relinquished and granted to the said city and its successors, for the uses and purposes specified in the ordinance of said city, ratified by an act of the legislature of the said state approved on the 11th of March, 1858." It is conceded that this land forms a part of the tract designated as Lafayette Park upon the map showing the location of streets and public squares in the city of San Francisco; the map approved by one of the ordinances of said city, ratified by the act of the legislature of this state approved March 11, 1858 (Stats. 1858, p. 52), and referred to in the act of Congress of July 1, 1864. It further appears from the evidence that the defendants and their successors in interest were in the actual possession of the land on January 1, 1855, and so continued until after March 11, 1858.

1. It has been repeatedly held by this court that the act of the legislature of March 11, 1858, ratifying and confirming the ordinance referred to, operated as a selection and dedication to public use of the tracts marked as public squares on the map approved by that ordinance, and that the above-mentioned act of Congress of July 1, 1864, had the effect to confirm such dedication, and make it operative upon the legal title, as well as upon such title as the city held prior thereto: *Hoadley v. San Francisco*, 50 Cal. 265; *Sawyer v. San Francisco*, 50 Cal. 370; *Hoadley v. San Francisco*, 70 Cal. 320. This being so, it follows that the land in controversy was in fact dedicated to the public as alleged in the complaint, and, as a consequence, defendants never acquired any title thereto by virtue of the possession of themselves or predecessors, and the act of the legislature of this state of March 11, 1858, or the ordinances thereby ratified. The plaintiff is, therefore, entitled to maintain this action, unless estopped by one or the other of the judgments relied upon by defendants as a bar.

2. It was held by this court upon the former appeal in this case that the judgment rendered in favor of defendant Holladay, in the action brought by the people of the state upon relation of Bohen, is not a bar to the present one. In discussing this question, the court said: "The title which passed to the city and county of San Francisco by the act of Congress of July 1, 1864, was unaffected by the judgment pleaded in bar herein; first, because it was acquired long after issue in the action in which that judgment was rendered was joined and the cause submitted for decision, and was not put in issue

therein: *People's Sav. Bank v. Hodgdon*, 64 Cal. 95; *Valentine v. Mahoney*, 37 Cal. 396; and secondly, because the attorney-general of the state had no power to submit to the determination of any tribunal the title of the government of the United States": *People v. Holladay*, 68 Cal. 439. This record does not disclose any additional facts in relation to the judgment the effect of which was thus passed upon, and the decision upon the former appeal quoted must, therefore, be deemed the law of the case, so far as concerns the particular point therein decided.

The finding of the court below, that the people of the state have acquired no new or different title to the land in controversy since the commencement of the former action, relied upon as a bar, is not sufficient to take the question now under consideration out of the operation of the law declared on the former appeal; first, because the finding itself was set aside by the order granting a new trial; and secondly, because it was only a conclusion of law which that court drew from the same facts which were before this court on the former appeal. Nor can the appellants avoid the force of that decision by the special and particular manner in which they have alleged that respondents are estopped to retry in this action the question of dedication which was in issue and passed upon in the former action. The fact of dedication is essential to support respondents' cause of action, and that they are not estopped by the judgment relied upon by appellants as an estoppel from showing such fact is not only the necessary and logical effect of the decision of this court upon the former appeal, but was so stated by the court in the following language: "To hold that the plaintiffs are concluded, by the judgment pleaded in bar, from showing that there was a dedication to which the title conveyed by the act of 1864 related, and which it perfected, would be, in effect, to hold the title conveyed by the act of 1864 concluded by the former judgment, which, for the reasons already given, is not the case." As already stated, this decision constitutes the law of this case, and we hold, in accordance with it, that the former judgment in the action brought against defendant Holladay by the present plaintiff, upon the relation of Bohen, does not constitute a bar to this action, or conclude the question of dedication involved here.

3. This brings us to consider the effect of the judgment in the case of *Holladay v. City and County of San Francisco*, com-



menced December 17, 1864, and after the legal title to the land in controversy had passed from the United States by the act of Congress of July 1, 1864. That was an action to quiet title, and it appears from the evidence that the question therein litigated was, whether the land in controversy had ever been dedicated to the public use claimed by the people in this action. It is contended by the respondents that such matter was not in issue in that case, the answer of the defendant simply denying all the allegations of the complaint in that action. But this court held in the late case of *San Francisco v. Holladay*, 76 Cal. 18, in relation to this particular judgment, that this question was involved therein, and that such judgment was a bar to any further assertion by the city and county of San Francisco that it held the legal title in trust for the people. The court there said: "It is claimed by appellant that the record in that case is not binding upon the city or the people, for the reason that at the date of the institution of the suit all the title that the city had was the bare right to the possession of this land in trust for the people of the state. But the particular matter litigated in that suit was, whether the city held the fee in trust for the people, or at all, and it was adjudged therein that the city had no right, title, or interest in the land. The judgment in that case was not appealed from, and is final so far as the city is concerned. It quieted the title of the plaintiff as against any and all claims of the defendant therein": *San Francisco v. Holladay*, 76 Cal. 18.

The pleadings in that case being sufficient to put in issue the question of dedication involved herein, what is the effect of such judgment upon the rights of the present plaintiff? Are the people of the state thereby estopped from asserting that the defendant in that action, the city and county of San Francisco, did hold and now holds the legal title to the land in controversy in trust for the use of the people of the state as a public square?

The city and county of San Francisco is a municipal corporation created by the legislature of the state, and has conferred upon it by the state full power and jurisdiction over the public squares within its territorial limits, with the right to sue and be sued, and this necessarily includes the authority to maintain and defend all actions relating to its right to subject to the public use such squares or land claimed by it to have been dedicated for such purposes; and in any action brought

by it for the purpose of vindicating and protecting the public rights in such squares, or land claimed as such, the state would be bound by the result, because in such action the city and county would in fact represent the people of the state by virtue of the authority given it to maintain such actions for the purpose of preserving the public rights of which it is the trustee. A municipal corporation is for many purposes but a department of the state organized for the more convenient administration of certain powers belonging to the state: *Sinton v. Ashbury*, 41 Cal. 530; *Barnes v. District of Columbia*, 91 U. S. 544; *Board of Education v. Martin*, 92 Cal. 209; and such corporations, in their management and control over streets and squares within their limits, and in actions for the vindication and preservation of the public rights therein, exercise a part of the sovereignty of the state. Accordingly, it has been held that a city has the same right to maintain an action to prevent the unlawful obstruction of a street as would the people of the state. Thus in the case of *Metropolitan City R'y Co. v. Chicago*, 96 Ill. 628, it is said: "The state has a like control over highways, streets, and public grounds as is exercised by the crown of England, and may have like remedies against persons unlawfully obstructing the same. A portion of the political power of the state is committed to the municipalities. The general assembly of this state has vested in cities, villages, and towns the right to control the use of highways, streets, and public grounds within their respective limits, and they are invested with the authority of the crown and of the state, in this respect, to file bills to prevent and remove obstructions from the streets, highways, and public grounds under their control." So, also, in *Trustees v. Cowen*, 4 Paige, 510, 27 Am. Dec. 80, it was held that the municipality so far represents the equitable rights of its inhabitants, that it is authorized to maintain an action to abate a public nuisance upon a public square. And to the same effect is the case of *City of Demopolis v. Webb*, 87 Ala. 659.

There are other cases which seem to base the right of municipal corporations to maintain such actions upon the narrower ground that they suffer special and peculiar injury in the obstruction of streets and squares different from that sustained by the general public, but we are satisfied with the broader rule announced in the above-cited cases.

We entertain no doubt that the city and county of San Francisco has the authority to maintain an action for the

purpose of preserving the rights of the general public to the use of squares, or land claimed as such, within its limits, and that in such action it is authorized to put in issue the alleged rights of the people to such easement, and that the state itself is bound by the result of such litigation, if the same is not collusive. And we see no reason why these same rights might not also be tried and determined in an appropriate action in which the municipality might be a defendant, — as, for instance, ejectment, where it had ousted the claimant from the possession; or by injunction, where it threatened to remove his buildings or trees or a portion of the soil from the land claimed by it as a public square, — and the public would be bound by the final judgment therein if the action was conducted in good faith on the part of the city. The rule that the citizen shall not be twice vexed for the same cause of action is as binding upon the state as upon other litigants; and the legislature, in conferring upon the city power to maintain and defend in the courts the rights of the state to streets and squares within its limits, must be presumed to have done so with reference to this well-known maxim, and to have intended that the state should be bound by the result of such litigation. And that an action by the adverse claimant against the city, to quiet his title, where the city claims to hold the legal title in trust for the use of the people, as a public square, is an appropriate action to determine such claim, is the effect of the decisions of this court in *San Francisco v. Holladay*, 76 Cal. 18, and *San Francisco v. Itsell*, 80 Cal. 57.

In *San Francisco v. Holladay*, 76 Cal. 18, the action was ejectment by the city and county of San Francisco, for the purpose of recovering the land in controversy in this action, the plaintiff claiming that it held the legal title to the land in trust for the people of the state, and that the same had been dedicated to the use of the public, and that the defendants were intruders thereon. The action was therefore substantially one for the use and benefit of the people of the state, and as the plaintiff therein was authorized by law to bring the action for the purpose of preserving the alleged rights of the people, it could only be defeated by showing that the people of the state were not entitled to maintain such action; and the court, in holding that the right of the city and county of San Francisco to recover possession of the land in controversy for the use of the general public was barred by the judgment in *Holladay v. City and County of San Francisco*, which is pleaded in bar of

this action, in effect decided that the rights of the people of the state were also barred by that judgment.

There is nothing decided in the case of *Branham v. Mayor etc. of San José*, 24 Cal. 585, in conflict with the conclusion we have reached on this point. All that was there decided was, that a decree foreclosing a mortgage, and the execution of a sheriff's deed under the decree, transferred to the purchaser the interest which the mortgage created and vested in the mortgagee, and nothing more. In that case the city of San José executed a mortgage upon certain lands, which mortgage was void because of want of power in the city to execute the same or to alienate the land, and it was held that the subsequent foreclosure of this mortgage, in an action to which the city was a party, gave to the mortgage no additional validity, and that the city was not estopped by the decree of foreclosure from asserting the invalidity of the title attempted to be conveyed by the sheriff's deed thereunder. This was only the assertion of a very familiar rule as to the estate or title upon which a decree of foreclosure operates, but, manifestly, can have no relation to the question we have been considering, which is, whether the state, by authorizing the city and county of San Francisco to sue and defend actions for the purpose of preserving and protecting the rights of the general public in land claimed to have been dedicated as a public square is bound equally with the municipality by the result of such litigation.

4. The judgment in *Holladay v. City and County of San Francisco*, and which we hold to be equally binding upon the state as upon the city of San Francisco, was undoubtedly erroneous under the law as declared by this court, subsequently, in the cases of *Sawyer v. San Francisco*, 50 Cal. 370, and *Hoadley v. San Francisco*, 70 Cal. 324; but its force as an adjudication of the rights of the parties thereto, and those in privity with them, is not affected thereby: *Case v. Beauregard*, 101 U. S. 688.

To say that the bar of an estoppel by judgment can be removed by showing that it ought not to have been rendered would be, in effect, to declare that no fact is to be deemed as finally set at rest by a judgment, and that litigation upon the same matter may be interminable. But by the judgment in *Holladay v. City and County of San Francisco*, it was determined the defendants here own an undivided nineteen twentieths of the land in controversy, and the finding of the court

below, that all the land in controversy is the private property of the defendants, free and clear from any and all dedication whatever (and we construe the first conclusion of law as a finding of fact), was not justified by that judgment or by the other evidence in the case, and because of this error in the findings the court did not err in granting plaintiff's motion for a new trial. Although the effect of the judgment in the case just referred to is a bar to the right of the plaintiffs to the relief demanded in this action, they are still entitled to a correct finding as to the extent of the interest owned by defendants in the land in controversy. Upon the evidence disclosed in this record, the finding as to this fact should have been in accordance with the terms of the judgment in *Holladay v. City and County of San Francisco*, as above stated.

Order affirmed.

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THE PRINCIPAL CASE was followed in *People v. Smith*, 93 Cal. 490, which was an action to abate a nuisance consisting of a building upon land alleged to be a public street of the city of San Francisco. Among other defenses, the defendant pleaded that in August, 1877, and while he was in possession of the premises, the city and county of San Francisco, falsely pretending that the premises were within the limits of a public street, wrongfully entered thereon and ousted him therefrom; that thereafter he commenced an action against such city and county to recover possession; that in its answer in such action the city and county claimed that the premises had been dedicated to the public use as a street; but that final judgment was entered in his favor on May 14, 1880, under which he was restored to the possession of the property by the sheriff. The facts thus pleaded having been established at the trial, the court nevertheless gave judgment for the plaintiff, on the ground that the people of the state were not parties to, nor bound by, the judgment in the former action. The appellate court, however, on authority of the principal case, reversed this judgment.

The principal case is a very important one, and, more completely and distinctly than any other, determines the relation between the people of a municipality or of a state and the municipality itself, declaring in effect that the latter is a trustee of the former with respect to property dedicated, or claimed to be dedicated, to public uses; that when, as such trustee it has authority to prosecute or defend actions, any judgment entered against and binding upon it is equally binding on the alleged beneficiary, the people of the city or state. Examining this question before the decision of the principal case was announced, we had reached the same conclusion. We here extract what we then wrote upon the effect of judgments against counties and municipal corporations upon their citizens and tax-payers.

"The position of a county or municipal corporation towards its citizens and tax-payers is, upon principle, analogous, to that of a trustee towards his *census que trust*, when they are numerous, and the management and control of their interests are by the terms of the trust committed to his care. A judgment against a county or its legal representatives in a matter of general interest to all its citizens is binding upon the latter, though they are not parties

to the suit. A judgment for a sum of money against a county imposes an obligation upon its citizens which they are compelled to discharge. Every tax-payer is a real, though not a nominal, party to such judgment. If, for the purpose of providing for its payment, the officers of the county levy and endeavor to collect a tax, none of the citizens can, by instituting proceedings to prevent the levy or enforcement of the tax, dispute the validity of the judgment, nor relitigate any of the questions which were or which could have been litigated in the original action against the county: *Clark v. Wolf*, 29 Iowa, 197; *State v. Rainey*, 74 Mo. 229; *Harmon v. Auditor*, 123 Ill. 122; 5 Am. St. Rep. 502. If, in an action against the officers of a county, a tax is determined to be valid, a tax-payer of the county cannot afterwards maintain suit to enjoin the collection of such tax: *Lyman v. Paris*, 53 Iowa, 498. An action having been brought by certain tax-payers of a town to enjoin the issue of bonds, a judgment against them was held to be conclusive upon all other tax-payers: *Harmon v. Auditor*, 123 Ill. 122; 5 Am. St. Rep. 502. A judgment against county commissioners, directing that a writ of mandate issue requiring them to assemble and call an election on the question of a change of the county site, is conclusive on all citizens of the county, because the commissioners are representatives of the county in the matter of their duties under the statute; and though they fail to avail themselves of any legal defense to the writ, the people of the county are concluded by the judgment: *Sauls v. Freeman*, 24 Fla. 209; 12 Am. St. Rep. 190.

“The great majority of the decisions relating to the privity between a municipality and its tax-payers and citizens have resulted from attempts to resist the enforcement of bonds issued or taxes levied by it, after judgment has been rendered to which it was a party, in favor of such bonds or taxes; but no reason is perceived why the same principle does not apply to other litigated questions. Thus a municipality may claim that certain real estate had been dedicated to public uses, — for instance, that it is a public square or street, — and as a representative of its citizens and tax-payers may litigate that question with one who claims that it is private property, and not subject to any public use whatsoever. The question, when once litigated and decided, in an action to which the municipality is a proper party, should be regarded as forever set at rest, unless some additional title should be acquired by one of the litigants after the commencement of the action. Either this must be true, or each citizen, and perhaps each citizen of each generation of citizens, must be at liberty to commence an action and litigate the question for himself, either in his own name or in that of the municipality or of the people of the state, or in some other mode adapted to the litigation of the question. A case determined by the court of appeals of Virginia is sometimes cited as in opposition to the views we have expressed: *Warwick v. Mayo*, 15 Gratt. 528; but an examination of that case will show that it did not present the question here under consideration. In the first place, the preceding action had been ejectment against the city to recover possession of the property, and the court was of the opinion that the existence of the easement claimed by the city could not have constituted any defense to that action, and therefore that the recovery by the plaintiff did not tend to negative the existence of the easement claimed by the city. In the second place, whatever was said upon the subject was a dictum, because the court, in the case before it, proceeded no farther than to inquire whether the plaintiff had been acting in good faith in the claim made by him to the lands included in his former action, and which the city claimed to be a public street. That the question of the right to the easement was not considered to be involved in the first action is manifest



from the following language of the court: 'It is to be regretted that in a matter where the public convenience is so much involved that the right to the easement itself had not been presented either by an action of trespass against the city authorities for removing the obstruction, or some proceeding to abate the alleged nuisance, so that the right might have been settled by a court of record having competent authority.'

"Where, however, the action is such as to put in issue the right of a city in property claimed by it as a public street or square, as where the action is brought against it to determine conflicting claims of title, there appears to be no doubt that a judgment against it is conclusive in all subsequent actions to which it is a party, that the property claimed by it is not such public street or square: *San Francisco v. Holladay*, 76 Cal. 18; *City and County of San Francisco v. Itself*, 80 Cal. 57. In Louisiana, where a claimant brought an action against a municipality to determine whether land had been dedicated to public use, and recovered a judgment, it was held that this judgment was conclusive in a later litigation wherein another citizen sought to maintain the existence of the dedication, contrary to the former decision, the court saying: 'The municipal authorities represent not only the corporators, but the public': *Xiques v. Bigac*, 7 La. Ann. 515.

"After a judgment has been entered against a municipality, determining adversely to it a claim made by it as the representative of its citizens, a similar claim may be made by a proceeding instituted in the name of the state as the representative of the general public, and then the question arises whether the identity of the parties is such that the judgment, when the public was represented by the municipality, is a bar to an action in which the public is represented by the state. It is clear that the issues in the two controversies may be the same; it is equally clear that the nominal parties in the two suits are different, and that in neither suit was the nominal the real party in interest. In both, the real party is the public, in whose behalf the dedication of the property is claimed, and as the real parties are the same, the judgment in the first action should be conclusive in the second. In South Carolina, suit was brought by certain tax-payers against the commissioners of the county to obtain an injunction to prevent their issuing bonds, and resulted in a decree denying the injunction and affirming the right to issue the bonds; which were thereupon issued and sold to *bona fide* purchasers. Thereafter an action was brought in the name of the state upon the relation of citizens and tax-payers of the same county to have the same bonds declared null and void, and issued without authority of law. The judgment in the suit was held to be a bar to the second action, because the state had no substantial interest in the action in which its name was used, and the two actions were for the benefit of the same class of persons, and that 'it is not reasonable to suppose that the state, in lending its name to individuals for the protection of their rights, intended to subvert the principles governing controversies of the class to which this belongs': *State v. Chester etc. R. R. Co.*, 13 S. C. 290. On the other hand, in Kansas, where an elector of the county, in a proceeding commenced by him, procured a writ of *mandamus* to issue, compelling the county clerk to remove his office to a town claimed to be the county seat, it was held that this was not conclusive against a proceeding in *mandamus* subsequently instituted by the attorney-general in the name of the state, 'to compel obedience to the law of the state, commanding county officers to keep their offices at the county seat.' Disposing of this question, the court said: 'This plea of *res adjudicata* is fairly in the case and must be determined. A majority of the court hold that



the judgment and proceedings in the Hammond case do not conclude the relator in this case, and that the judgment as pleaded and set forth is no bar to this action; that while there may be some identity of cause of action, the state can interfere in matters of this kind in the interest of peace and good order, and to command obedience to its laws, and that for this purpose it cannot be concluded by suits brought by private persons to protect or enforce private rights. In the case of *Garner v. State*, upon the relation of Moon, 28 Kan. 790, it was said, "While the statute permits any elector who considers himself aggrieved by the result of any election held for removing, establishing, or relocating the county seat of a county to contest by an action in the district court such election, yet if different actions are brought and different judgments are rendered, it is possible that the attorney-general or the county attorney, in the interest of the public, might, in a proper action instituted for that purpose, have all these different judgments reviewed and superseded by general adjudication as to which town, city, or place is the legal county seat of a county, and thus bring all the county officers, with their books, papers, and records, to such town, city, or place as the county seat"; *State v. Stock*, 38 Kan. 154.

"Though its officer is a nominal party to a suit, and the municipality is not joined with him, a judgment is conclusive for or against it if it was the real party in interest, and as such prosecuted and defended in the action: *Millikan v. La Fayette*, 118 Ind. 323; *Faust v. Baumgartner*, 113 Ind. 139. It is only to the extent that a county or municipal corporation represents persons that a judgment against it is binding upon them. It does not represent its citizens and tax-payers in respect to their private property, but only in matters of general interest, and therefore a judgment against or in favor of a municipality, concerning a single lot or other matter in which one of its citizens has a private interest, cannot bind him: *Rork v. Smith*, 55 Wis. 67. So, though a county or city represents its citizens and tax-payers respecting matters of general interest, it is not the representative of other citizens of the state interested in the same general question. Hence a judgment against it cannot conclude other counties or municipalities in a subsequent action, though the issues involved are the same: *St. Paul etc. R. R. Co. v. Robinson*, 41 Minn. 394"; *Freeman on Judgments*, sec. 178.

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[IN BANK.]

## FAY v. PACIFIC IMPROVEMENT COMPANY.

[98 CALIFORNIA, 253.]

**AN INN** is a house which is held out to the public as a place where all transient persons who come will be received and entertained as guests for compensation. The fact that the house is open for the public, that those who patronize it come to it upon an invitation which is extended to the general public, and without any previous claim for accommodation or agreement as to the duration of their stay, marks the main distinction between an inn and a boarding-house.

**AN INN IS NOT THE LESS ONE** because in some respects it is conducted differently or has more attractions than other public hotels, so long as it is held out to the public as a place for the entertainment of transient per-

sons who have occasion to patronize it. Hence a house having the other characteristics of an inn is not converted into a mere boarding-house by the fact that it is not situate upon a public highway, and that the grounds upon which it stands are inclosed, and the gates locked at night.

**INN — GUESTS.** — A PERSON IS TO BE DEEMED A GUEST at an inn, and not a boarder, though upon his arrival he ascertains, before being assigned to a room, what he will have to pay for room and board, if his intention was to remain for a week or two only, and then to proceed to the East, and there was no agreement as to the time he would stay, nor any reduction in price in consideration of the agreement to remain a definite time.

**INNKEEPER IS LIABLE**, under the Civil Code of California, for the loss of personal property placed by guests under his care, "unless occasioned by an irresistible superhuman cause, by a public enemy, by the negligence of the owner, or by the act of some one he brought into the inn." The words "superhuman cause," as here used, are equivalent in meaning to the phrase "the act of God."

**INNKEEPERS ARE LIABLE** for a loss resulting from an accidental fire, unless it was started by lightning, or some superhuman agency.

**INNKEEPERS. — OWNERS AND GUESTS MAY RETAIN POSSESSION OF PROPERTY** intended for their personal use, as jewelry and wearing apparel, without discharging the innkeeper from responsibility for its loss or destruction by fire while in the room of the guest.

*S. F. Geil and H. V. Moorehouse*, for the appellant.

*A. B. Hotchkiss, amicus curiæ*, for the appellant.

*D. M. Delmas*, for the respondent.

**THE COURT.** Upon further consideration of this cause, after hearing in Bank, we are satisfied with the conclusion reached in Department, and with the opinion there rendered, and for the reasons stated in said opinion, the judgment and order appealed from are affirmed.

The following is the opinion of Department Two, above referred to, rendered on the 23d of June, 1891:—

**DE HAVEN, J.** The plaintiff recovered judgment against the defendant for damages occasioned by the loss of her jewelry, wearing apparel, and other articles of personal property needed for her personal use, consumed by fire at the burning of the Hotel Del Monte, April 1, 1887, of which the defendant was at that time the proprietor.

The court below found that the Hotel Del Monte was, at the date named, a public inn, and that plaintiff was a guest therein. On this appeal the defendant claims that the evidence does not sustain these findings; and also that the burning of the hotel was an irresistible superhuman cause, for which it is not liable, and that it is not, in any event, liable

for plaintiff's diamonds and other jewelry, because not deposited in defendant's safe.

1. An inn is a house which is held out to the public as a place where all transient persons who come will be received and entertained as guests for compensation,—a hotel. In *Wintermute v. Clark*, 5 Sand. 247, an inn is defined as a public house of entertainment for all who choose to visit it, and this definition was quoted with approval by this court in *Pinkerton v. Woodward*, 33 Cal. 596; 91 Am. Dec. 657. The fact that the house is open for the public, that those who patronize it come to it upon the invitation which is extended to the general public, and without any previous agreement for accommodation or agreement as to the duration of their stay, marks the important distinction between a hotel or inn and a boarding-house. This difference is thus stated in Schouler on Bailments: "An inn is a house where a keeper holds himself out as ready to receive all who may choose to resort thither and pay an adequate price for the entertainment; while the keeper of a boarding-house reserves the choice of comers and the terms of accommodation, contracting specially with each customer, and most commonly arranging for long periods and a definite abode": Schouler on Bailments, 253.

We think the evidence in this case is full and complete to the point that the Hotel Del Monte was a public inn. It not only had a name indicating its character as such, but it was also shown that it was open to all persons who have a right to demand entertainment at a public house; that it solicited public patronage by advertising and in the distribution of its business cards, and kept a public register in which its guests entered their names upon arrival and before they were assigned rooms; that the hotel, at its own expense, ran a coach to the railroad station for the purpose of conveying its patrons to and from the hotel; that it had its manager, clerks, waiters, and in its interior management all the ordinary arrangements and appearances of a hotel, and the prices charged were for board and lodging. These facts were certainly sufficient to justify the court in finding, as it did, that the appellant was an innkeeper: *Krohn v. Sweeny*, 2 Daly, 200. Nor was the force of this evidence in any wise modified by the fact that the hotel was not immediately upon a highway, or that the grounds upon which it stood were inclosed and the gates closed at night. The location of the hotel, the extent of the grounds surrounding it, and the manner in which these

grounds were improved, and reserved for the exclusive use and enjoyment of those who patronized it, doubtless made the hotel more attractive to those who chose to make a transient resort of it, but did not convert it into a mere boarding-house. A hotel is none the less one because in some respects it may be conducted differently or have more attractions than other public hotels, so long as it is held out to the public as a place for the entertainment of all transient persons who may have occasion to patronize it.

“Modes of entertainment alter with the fashion of the age, and to preserve a clear definition is not easy. It is not wayfarers alone, or travelers from a distance, that at the present day give character to an inn, the point being rather that people resort to the house habitually, no matter whence coming or whither going, as for transient lodging and entertainment”: Schouler on Bailments, 249.

2. The evidence shows that the plaintiff was a guest, and not a boarder. The fact that upon her arrival, and before being assigned to her room, she ascertained what she would have to pay for the room and board is not sufficient of itself to show that she was not received as a guest: *Pinkerton v. Woodward*, 33 Cal. 597; 91 Am. Dec. 657; *Hancock v. Rand*, 94 N. Y. 1; 46 Am. Rep. 112; *Jalie v. Cardinal*, 35 Wis. 118; *Hall v. Pike*, 100 Mass. 495; *Berkshire Woolen Co. v. Proctor*, 7 Cush. 417.

The Del Monte being a public hotel, in the absence of evidence showing that plaintiff went there as a boarder, the presumption would be that she went there as a guest: *Hall v. Pike*, 100 Mass. 495. Not only does the evidence fail to overthrow this presumption, but the testimony of the plaintiff shows that she was there as a mere temporary sojourner, without any agreement as to the time she should stay, and with only the intention on her part of resting a week or two, and then proceeding to the East. She obtained no reduction of price in consideration of an agreement to remain a definite time, or as a boarder; nor was there anything said from which it could be inferred that there was any understanding between her and the defendant that she was to be received as a boarder, and not as a guest.

3. Under section 1859 of the Civil Code, an innkeeper is liable for the loss of personal property placed by his guests under his care, “unless occasioned by an irresistible superhu-

man cause, by a public enemy, by the negligence of the owner, or by the act of some one whom he brought into the inn."

In this case, the loss was occasioned by the burning of the hotel, and the origin of the fire is not shown, further than that it broke out in one of the rooms in which there was nothing except the batteries which supplied the bells with electricity. Under this state of facts, the defendant is liable: *Hulett v. Swift*, 33 N. Y. 571; 88 Am. Dec. 405. A fire thus occurring cannot be considered an "irresistible superhuman cause," within the meaning of section 1859 of the Civil Code. The words "irresistible superhuman cause" are equivalent in meaning to the phrase "the act of God," and refer to those natural causes the effects of which cannot be prevented by the exercise of prudence, diligence, and care, and the use of those appliances which the situation of the party renders it reasonable that he should employ: 1 Am. & Eng. Ency. of Law, 174. A loss arising from an accidental fire is not caused by the act of God, unless the fire was started by lightning or some superhuman agency: *Miller v. Steam Nav. Co.*, 10 N. Y. 481; *Chicago etc. R. R. Co. v. Sawyer*, 69 Ill. 285; 18 Am. Rep. 618.

4. The court finds that the property lost was such as was needed for the present personal use of the plaintiff. We cannot say that the evidence does not support this finding. It certainly cannot be said that jewelry worn by a woman daily must, when not actually upon her person, be deposited with the innkeeper, in order to make him responsible for its loss in the inn. If worn daily, it does not cease to be needed for present personal use when its possessor lays it aside upon retiring for the night. Nor is it necessary, in order to render the innkeeper liable, that the property should have been delivered into his exclusive personal possession.

"The guest may retain personal custody of his goods within the inn,—as of his trunk and its contents, his wearing apparel, and other articles in his room, and any jewelry or valuables carried or worn around his person,—without discharging the innkeeper from responsibility": *Jalie v. Cardinal*, 85 Wis. 126.

We have examined the other points made by appellant, but do not think they call for special discussion.

The rule which makes an innkeeper liable for the value of the property of his guest, in case of its loss by fire, may at first thought be deemed a harsh one; but the loss must fall somewhere, and section 1859 of the Civil Code provides upon

whom it should properly fall, and the innkeeper's liability in this respect is one of the burdens pertaining to the business in which he is engaged, and in view of which it must be supposed that he regulates his charges.

Judgment and order affirmed.

**INNKEEPERS — INN — WHAT IS.** — An inn is a public house of entertainment for all who choose to visit it: *Pinkerton v. Woodward*, 33 Cal. 557; 91 Am. Dec. 657; extended note to *Olute v. Wiggins*, 7 Am. Dec. 451.

**INNKEEPERS — GUESTS — WHO ARE.** — A traveler who is met at the depot by the porter of a hotel, who indicates what conveyance he is to take, and who takes the check for the traveler's baggage, is a guest of the hotel, and can hold the proprietor liable for the loss of his baggage: *Cookery v. Nagle*, 83 Ga. 696; 20 Am. St. Rep. 383, and note; extended note to *Olute v. Wiggins*, 7 Am. Dec. 451. See *Moore v. Long Beach etc. Co.*, 87 Cal. 483; 22 Am. St. Rep. 265, and note.

**INNKEEPERS — LIABILITY FOR LOSS OF GUEST'S BAGGAGE.** — An innkeeper can avoid liability for loss of his guest's baggage only on the grounds that the loss was occasioned by an act of God, the public enemy, or the misconduct of the guest or a friend accompanying him: *O'Brien v. Vaill*, 22 Fla. 827; 1 Am. St. Rep. 219, and note. An innkeeper is not liable for loss of boarders' baggage and other valuables by fire not shown to have been caused by the negligence of the innkeeper or his servants: *Moore v. Long Beach etc. Co.*, 87 Cal. 483; 22 Am. St. Rep. 265, and note; extended note to *Cutler v. Bonney*, 18 Am. Rep. 130-136; *Pinkerton v. Woodward*, 33 Cal. 557; 91 Am. Dec. 657, and note.

**INNKEEPERS — WHETHER GUESTS MAY RETAIN PROPERTY.** — The guest of a hotel is not required to place his valuables in custody of the innkeeper, even though the innkeeper had an iron safe for that purpose, and the guest knew of that fact: *Johnson v. Richardson*, 17 Ill. 302; 63 Am. Dec. 369, and note.

[IN BANK.]

## BOURN v. HART.

[33 CALIFORNIA, 321.]

**CONSTITUTIONAL LAW — GIFTS FORBIDDEN.** — A statute appropriating money to pay the claim of a guard at a state prison, for personal injury resulting to him from the loss of his arm while in the discharge of his duties, is forbidden by the clause of the constitution of California declaring that the legislature shall have no power to make any gift of any public money to any individual, or to grant any extra compensation or allowance to any public officer or servant of the state, after the service has been performed, or the contract has been entered into, and performed in whole or in part.

**STATE — RISKS ASSUMED IN ENTERING INTO EMPLOYMENT OF.** — One who enters the service of the state assumes all the risks attending such employment, whether arising from its ordinary perils, or resulting from the

negligence or misfeasance of other servants of the state, and an appropriation to indemnify such servant for injuries sustained while in such service is a mere gratuity.

**STATE IS NOT LIABLE FOR THE NEGLIGENCE OR MISFEASANCE** of its officers or agents, except when such liability is voluntarily assumed by its legislature.

**NEGLIGENCE — LIABILITY OF STATE.** — A state is not answerable to one of its officers or servants for damages resulting to him from the misconduct or negligence of another officer or servant. The doctrine of *respondens superior* does not prevail against the sovereign, in the necessary employment of public agents.

*Robert T. Devlin and Jud C. Brusie*, for the petitioner.

*Attorney-General Hart*, for the respondent.

DE HAVEN, J. This is an original proceeding, wherein the petitioner asks this court to issue a writ of *mandamus*, directed to the defendants as members of the state board of examiners, commanding them to allow his claim against the state for the sum of ten thousand dollars, in accordance with the provisions of an act of the legislature, the first section of which, and the only one necessary to a proper understanding of this case, is as follows: —

“Sec. 1. The sum of ten thousand (\$10,000) dollars is hereby appropriated out of any moneys in the general fund of the state treasury not otherwise appropriated, to pay the claim of A. J. Bourn, a guard at the state prison at San Quentin, in this state, for personal injuries, namely, the loss of his right arm while in the discharge of his duties, under the orders of his superior officer, and while in the service of the state of California.”

The petition sets forth the circumstances under which petitioner lost his arm, but which need not be referred to here, as we have held, in the case of *Stevenson v. Colgan*, 91 Cal. 649, 25 Am. St. Rep. 230, that the constitutionality of a statute must be determined by the court from what appears on its face, when considered with reference to matters judicially noticed by the court.

The defendants have demurred to the petition, upon the general ground that the act under which petitioner claims is unconstitutional under sections 31 and 32 of article 4 of the constitution, which in effect provide, among other things, that the legislature shall have no power to make any gift of any public money or thing of value to any individual, or to grant any extra compensation or allowance to any public officer or servant of the state, “after service has been performed, or a



contract has been entered into, and performed in whole or in part."

In the case of *Stevenson v. Colgan*, 91 Cal. 649, 25 Am. St. Rep. 230, we decided that it was the purpose of these sections of the constitution to prohibit the legislature from making direct "appropriations to individuals from general considerations of charity or gratitude, or because of some supposed moral obligation resting upon the people of the state, and such as a just and generous man, although under no legal liability so to do, might be willing to recognize in his dealings with others" less fortunate than himself.

That such is the intention of the constitution we have no doubt, and it is equally clear to us that the act in question falls within the class of legislation thus prohibited. The petitioner was an officer or employee of the state. It is recited in the act that he met with the accident "while in the discharge of his duties, under the orders of his superior officer," and for the purpose of this decision, it may be conceded, as claimed by him, that the loss of his arm is to be attributed to the negligence of his superior officer. But whether it be attributed to negligence or misfeasance of such officer, or any other cause which can be suggested by the language of the act, the unconstitutionality of the statute is apparent. In entering the service of the state, the petitioner assumed all the risks attending such employment, whether arising from its ordinary perils, or resulting from the negligence or misfeasance of other servants of the state, and the appropriation made by this act is a mere gratuity, as the state was under no legal liability to compensate him for any loss which he may have sustained while thus in the discharge of his duties.

That a state is not liable for the negligence or misfeasance of its agents, except when such liability is voluntarily assumed by its legislature, is said by Danforth, J., in *Lewis v. State*, 96 N. Y. 74, 48 Am. Rep. 607, to be so "well settled upon grounds of public policy, and the doctrine is so uniformly asserted by writers of approved authority and the courts, that fresh discussion would be superfluous." And the supreme court of the United States, in *Gibbons v. United States*, 8 Wall. 269, in an opinion delivered by Mr. Justice Miller, say: "No government has ever held itself liable to individuals for the misfeasance, laches, or unauthorized power of its officers and agents."

In the case of *Clodfelter v. State*, 86 N. C. 51, 41 Am. Rep. 440, the plaintiff presented a claim against the state for damages

on account of the loss of his eyes, alleged to have been caused by the misconduct and negligence of officers and agents of the state, under whose authority and control he was placed. By the constitution of that state the court was empowered with authority "to hear claims against the state." But the court held that this provision only authorized it to hear such claims "as are legal, and could be enforced if the state, like one of its citizens, was amenable to process," and added: "The only question then presented is, whether the state, in administering the functions of government through its appointed agents and officers, is legally liable to a claim in compensatory damages for an injury resulting from their misconduct or negligence. That the doctrine of *respondeat superior* applicable to the relations of principal and agent created between other persons does not prevail against the sovereign in the necessary employment of public agents is too well settled upon authority and practice to admit of controversy."

The exemption of the state from paying damages for accidents of this nature does not depend upon its immunity from being sued without its consent, but rests upon grounds of public policy, which deny its liability for such damages. It is argued, however, that the state has in this instance assumed and acknowledged its liability by the act under consideration. But this is precisely what the legislature is forbidden to do. A legislative appropriation made to an individual in payment of a claim for damages on account of personal injuries sustained by him while in its service, and for which the state is not responsible, either upon general principles of law or by reason of some previous statute creating such liability, is a gift within the meaning of the constitution. The appropriation made to petitioner was a mere gratuitous assumption of an obligation from which the state was and is exempt, and is within the mischief which the framers of the constitution intended to remedy by the sections before referred to.

If the state desires to make itself liable for such damages as may be sustained by those in its service, it must do so by a general law which shall embrace all cases which may come within its provisions.

The demurrer to the petition is sustained, and judgment ordered for the defendants.

BEATTY, C. J. (dissenting). I dissent. In my opinion, the word "gift" was not used in section 31, article 4, of the con-

stitution in a sense broad enough to include compensation to a servant of the state for loss of life or limb in the discharge of his duties. Nor do I think such compensation is to be regarded as extra compensation for services, within the prohibition of the succeeding section of the same article.

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**STATES—GIFTS TO EMPLOYERS—VALIDITY OF.**—The legislature of California has no power under the state constitution to make gifts to its employees: *Robinson v. Dunn*, 77 Cal. 473; 11 Am. St. Rep. 297.

**STATES—LIABILITY FOR NEGLIGENCE OF OFFICERS.**—The state is not answerable in damages for injuries sustained by a convict in its prison through the negligence of the prison officers: *Olodfetter v. State*, 86 N. C. 51; 41 Am. Rep. 440, and note. An action will not lie against a county for personal injuries sustained through the negligence of its employees: *Hollenbeck v. Winnebago County*, 95 Ill. 148; 35 Am. Rep. 148, and note; *Sherbourne v. Yuba County*, 21 Cal. 113; 81 Am. Dec. 151, and note. Municipal corporations are not liable for the negligence of its officers or employees: *Okope v. Mureba*, 78 Cal. 533; 12 Am. St. Rep. 112.

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[IN BANK.]

## MORRILL v. NIGHTINGALE.

[98 CALIFORNIA, 452.]

**CONTRACT IS PROCURED BY MENACE** when it is obtained by threats of imprisonment upon a charge of embezzlement.

**CONTRACT IS PROCURED BY MENACE**, and is therefore subject to rescission, when it was induced by procuring a warrant for the arrest of one of the contracting parties on a charge of embezzlement, and such warrant was obtained, not for the purpose of prosecuting or convicting him, but with a view of frightening and intimidating him into executing such contract.

**CONTRACT—MENACE OF GUILTY PERSON.**—In that kind of menace which consists of a threat of injury to the character of a person it is entirely immaterial whether he is guilty or innocent of the crime charged.

**CONTRACT THE CONSIDERATION OF WHICH IS A COMPROMISE OF A FELONY** is based upon illegal consideration, and therefore void.

**CONTRACT UPON ILLEGAL CONSIDERATION—DUTY OF THE COURT.**—If the objection that a contract was made upon illegal consideration is not interposed by the party sought to be charged, it is the duty of the court to make it on its own behalf.

*Waldo M. York*, for the appellants.

*George J. Denis, J. H. Call, and Edward S. Bragg*, for the respondents.

**GAROUTTE, J.** This is an action in equity to foreclose a contract, and recover judgment upon four promissory notes

amounting in the aggregate to forty-three thousand dollars. The contract and notes were made by defendant Nightingale to the plaintiffs on account of an alleged purchase of the capital stock of the Milwaukee Furniture Company. The prayer of the complaint asks that judgment be had for the amount of the notes, and that certain real estate and the said capital stock be applied to the satisfaction of such judgment, said property having been transferred under the contract to secure the payment of the aforesaid notes. Among other matters, the answer sets out that the contract and notes were not signed by the defendant Nightingale voluntarily, but under coercion and intimidation, by threatening defendant with arrest and imprisonment upon a warrant of arrest which the plaintiffs at the time induced Nightingale to believe had been issued. Judgment went for the defendants, and this appeal is prosecuted from the judgment and order denying plaintiffs' motion for a new trial.

The merits of this appeal are fully tested by a determination as to whether or not the findings support the judgment; for after a careful consideration of the evidence, we are satisfied that the following findings of fact made by the court are fully supported thereby:—

“1. That on the twenty-sixth day of May, 1890, the plaintiffs fraudulently and illegally procured to be issued by a justice of the peace of Los Angeles city township a warrant for the arrest of the defendant Nightingale, under the name of John Doe, for the purpose of coercing the defendant Nightingale to pay certain sums of money and sign contracts for the payment of money to plaintiffs, upon the claim by plaintiffs that defendant Nightingale had embezzled large sums of money from the Milwaukee Furniture Company, of which defendant Nightingale had been acting as treasurer.

“2. That such warrant was not procured for any lawful purpose, or for the purpose of prosecuting or convicting the defendant Nightingale of any crime, but for the purpose of frightening and intimidating defendant Nightingale.”

“4. That on the ninth day of July, 1890, defendant Nightingale executed and delivered to the plaintiffs the contract and four promissory notes of that date, which are set forth in the complaint and supplemental complaint herein; but such contract and notes were not executed by the free or voluntary act of defendant Nightingale, but his signature and his execution thereof was induced solely by the well-grounded belief

on the part of defendant Nightingale that, unless he signed them and each of them, he would be arrested and imprisoned upon said warrant for such embezzlement, which the plaintiffs then and previously charged him with being guilty of; and that by signing the same, the embezzlement with which he was so charged would be compromised and settled.

"5. That at the time of executing said contract and notes, on July 9, 1890, the plaintiffs induced the defendant Nightingale to believe, and he did believe, that he would be arrested and imprisoned on said warrant if he refused to sign said contract and notes."

Measured by the facts set out in the findings, we think the defendant Nightingale was acting under a menace at the time of the signing of the contract and notes, which destroyed his free consent to the execution thereof, and which thereby afforded him ample grounds for the rescission of the same. The consent of a party to a contract must be free, and it is not free when obtained through duress or menace. Section 1569 of the Civil Code declares duress to consist in the "unlawful confinement of the person of the party, or of the husband or wife of such party," etc.; or "the confinement of such person, lawful in form, but fraudulently obtained." Section 1570 provides, menace consists in a threat of the duress above specified, or of a threat of injury to the character of any such person. In this case there was no arrest and confinement, hence no duress; but the history of the transaction, as disclosed by the findings, clearly indicates threats of imprisonment upon a charge of embezzlement, which, in effect, necessarily were threats of injury to the character of defendant Nightingale, and consequently a menace. The court finds that the contract and notes were executed under the influence of such menace, and such being the fact, the defendant's free consent to the execution thereof was never gained, and the judgment should stand. Section 518 of the Penal Code provides: "Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right." The findings of the court disclose a state of facts lacking but few elements, if any, to fill the measure demanded by the foregoing provision of the criminal code of this state. The findings show that the warrant of arrest was secured in bad faith and for purposes not countenanced in law. It was secured solely to be used as a menace for the collection of an indebtedness, and it was ever accompanied with the

threat that if such indebtedness was not satisfied the warrant would be executed and imprisonment follow. Such a proceeding is an abuse of criminal process, and impedes the due course of public justice. In the case of *Bane v. Detrick*, 52 Ill. 27, the court said: "The mortgage was void for another reason. It was executed through a perversion and abuse of criminal process. It is proved that Bane got out this process and used it to effect a settlement of a claim which there is much evidence to show was unfounded. It is against public policy that process should be thus used, and no court will allow the results flowing from it to be enjoyed by him who so uses it. It is a gross abuse of legal process, and no person should have the aid of a court of justice to profit by it." Under that kind of menace which consists in a threat of injury to the character of a person, it is entirely immaterial whether such person is guilty or innocent of the crime to be charged. It certainly would be no defense to the accusation of extortion that the charges or publications threatened to be made by the defendant, and by which he obtained valuable property, were true. The truth or falsity of these matters form no element in establishing the guilt or innocence of a defendant charged with extortion.

In *Hackett v. King*, 6 Allen, 58, it was decided that though a person was arrested under a legal warrant and by a proper officer, yet if one of the objects of the arrest was to extort money, or enforce the settlement of a civil claim, such arrest is a false imprisonment by all who have directly or indirectly procured the same or participated therein for any such purposes, and a release and conveyance of property obtained by means of such arrest is void. In *Taylor v. Jaques*, 106 Mass. 294, the court, in speaking of a certain instruction given by the lower court, said: "We do not concur with that view of the law. If he had embezzled their funds, they had a right to have him prosecuted. If he owed them a debt, they had a right to accept security for it. But they would have no right to make use of a criminal process for the collection of a debt. An arrest, even upon a legal warrant and upon a criminal charge, to compel the payment of a mere debt, would be a misuse of legal process, and the threat of such an arrest may constitute unlawful duress." In *Richardson v. Duncan*, 8 N. H. 511, the court said: "But it is now well settled that when there is an arrest for improper purposes without a just cause, or where there is an arrest for a just cause but without

lawful authority, or where there is an arrest for a just cause and under lawful authority for unlawful purposes, it may be construed a duress." It will thus be seen that an imprisonment for an unlawful purpose will constitute duress, and such being the fact, a threat of arrest and imprisonment, made for unlawful purposes, will constitute menace. There is some authority found in the decisions of the courts of Maine opposed to these views, but we think they are not the better rule.

The findings of the court are also sufficient to defeat plaintiffs' right of recovery upon the ground that the contract entered into was forbidden by section 1668 of the Civil Code, one of its objects being, indirectly at least, to relieve the defendant Nightingale from responsibility for a violation of the law. As was said in *Eadie v. Slimmon*, 26 N. Y. 15, 82 Am. Dec. 895: "Either the accusation which the defendant brought against Eadie was entirely unfounded, or he was seeking to compromise a criminal offense. If he knew that a crime had been committed by Eadie, he had no right to compromise it in this way, and the securities obtained upon such compromise were received as a consideration for compromising a felony, and for that reason were invalid; else the whole of his assertions and threats on the subject were a gross imposture." As the answer of defendants does not rely upon such defense, we will not pursue the subject further, although Chief Justice Ryan undoubtedly declared the true rule in *Wight v. Rindskopf*, 48 Wis. 348, wherein he said: "If the objection be not made by the party charged, it is the duty of the court to make it on its own behalf. Courts owe it to public justice and to their own integrity to refuse to become parties to contracts essentially violating morality or public policy by entertaining actions upon them. It is judicial duty always to turn a suitor upon such a contract out of court, whenever and however the character of the contract is made to appear."

The demurrer to the answer was properly overruled, and we see no error in the rulings of the court upon the admissibility of testimony.

Let the judgment and order be affirmed.

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DURESS — MENACE — WHAT IS. — Menace for which one may avoid his act or deed exists when he is put in fear of imprisonment: *Moore v. Adams*, 8 Ohio, 372; 22 Am. Dec. 723; extended note to *Hatter v. Greenlee*, 26 Am.



Dec. 374. Duress exists when there is fear of imprisonment, incited by threats: *Cribbs v. Soole*, 87 Mich. 340; 24 Am. St. Rep. 166, and note.

**CONTRACTS OBTAINED BY THREATS — POWER TO RESCIND.** — In relation to husband and wife, parent and child, each may avoid a contract induced and obtained by threats of the imprisonment of the other: *Adams v. Irving Nat. Bank*, 116 N. Y. 606; 15 Am. St. Rep. 447, and note. Duress invalidates a contract where the free-will of one of the parties has been constrained by threats of the other: *Love v. State*, 78 Ga. 66; 6 Am. St. Rep. 234, and note; note to *Haines v. Lewis*, 87 Am. Rep. 203; note to *Central Bank v. Copeland*, 81 Am. Dec. 602; *Lomerson v. Johnson*, 44 N. J. Eq. 93.

**CONTRACT — CONSIDERATION — COMPOUNDING FELONY.** — A mortgage given to suppress a criminal prosecution is void: *Pearce v. Wilson*, 111 Pa. St. 14; 56 Am. Rep. 243, and note. No action will lie for compensation for services in endeavoring to prevent an indictment, nor in endeavoring to induce the authorities to dismiss it, where the plaintiff did not act through a belief in the innocence of the accused: *Barron v. Tucker*, 53 Vt. 338; 38 Am. Rep. 684, and note. An agreement by one under sentence for crime to deliver notes and money to the prosecuting witness on condition of his signing a petition for pardon, and the granting of such petition, is void: *Haines v. Lewis*, 54 Iowa, 301; 37 Am. Rep. 202, and note.

## BYERS v. LOCKE.

[93 CALIFORNIA, 493.]

**STATUTE OF FRAUDS. — PAROL EVIDENCE IS ADMISSIBLE TO PROVE THAT A CONVEYANCE** made by a judgment debtor, after the sale of his property under execution, was for the purpose of enabling the grantee to redeem it from such sale, and that the latter agreed to hold the premises, to make such advances as should be required to pay taxes and assessments, and upon the sale thereof to repay such advances with interest, and pay the residue of the proceeds of the sale to the judgment debtor.

**DEED — EVIDENCE OF CONSIDERATION.** — A RECITAL IN A DEED that the consideration has been paid is not conclusive, nor does it estop the vendor from maintaining an action for the purchase price, on proof that the vendee agreed to pay an additional amount, contingent upon some future event or transaction, as that, upon resale by him, he would pay to the vendor a portion of the proceeds received in excess of the amount paid by him.

*W. C. Green and A. H. Carpenter*, for the appellant.

*Wilkes and Rutherford, J. G. Swinnerton, and John C. Byers*, for the respondent.

**HARRISON, J.** It is alleged in the complaint that the plaintiff, being the owner of certain real estate which had been sold under a decree of foreclosure, made an agreement with the defendant, just prior to the expiration of the time for redemption from said sale, that the defendant should advance the

money necessary therefor and redeem the property from said sale, and for the purpose of enabling him to do so, he would convey the premises to the defendant, and that the defendant should hold the same until such time as they might be sold, and in the mean time advance such moneys as might be necessary for the payment of taxes and assessments thereon, and that upon the sale of said premises he would, after deducting from the proceeds therefrom the moneys so advanced, with interest thereon at the rate of twelve per cent per annum, pay the balance of said proceeds to the plaintiff; that thereupon he did, on the tenth day of July, 1888, convey the premises to the defendant, who immediately redeemed the same from the foreclosure sale, and held them until April 12, 1890, on which day, with the consent of the plaintiff, he sold them for \$12,160, paying in the mean time certain amounts for taxes, street assessments, and other charges; that after deducting the amounts so paid, with interest thereon, from the amount received upon the sale, there remained \$2,021.87, for which he asked judgment against the defendant. The defendant denied that any such agreement had been made, and alleged that at the time of the conveyance to him he had purchased from the party his equity of redemption in the premises for the sum of \$150, which he then paid him, and that thereafter until the sale by him he had been the absolute owner thereof. The cause was tried by a jury, who rendered a verdict in favor of the plaintiff for the amount claimed by him, and from the judgment entered thereon the defendant has appealed.

The jury has determined, upon the contradictory evidence before it, that the agreement between the parties was as is alleged by the plaintiff, and its determination thereon is conclusive upon an appeal to this court.

The errors of law urged by the appellant are based upon his contention that it was not competent to prove this agreement by oral testimony, for the reason that it was an agreement relating to the sale of land. The contract or agreement upon which the action is brought is not, however, an agreement for the sale of land, or for the creation of any interest therein. The action is merely for the payment of the money agreed upon as the consideration for which the plaintiff executed to the defendant the conveyance of the land. It is not every agreement relating to the sale of lands that is within the statute of frauds, but only such agreements as are intended to create an interest in lands. The provision of the code is, that

an agreement "for the sale of real property, or of an interest therein, is invalid unless in writing": Civ. Code, secs. 1624, 1741; and that "all contracts may be oral, except such as are specially required by the statute to be in writing": Civ. Code, sec. 1622; and it is only when the agreement is required by the statute to be in writing that evidence of the agreement cannot be received without the writing: Code Civ. Proc., sec. 1973.

An agreement by the vendee to pay for the land sold and conveyed to him is not within the statute of frauds: *Thomas v. Dickinson*, 12 N. Y. 364; and the vendor, after the contract on his part has been executed by a conveyance of the land, may maintain an action upon such agreement, and establish it by oral testimony. The recital in the deed that the consideration has been paid is not conclusive: *Shephard v. Little*, 14 Johns. 210; nor is the vendor thereby estopped from maintaining an action for its price: *White v. Miller*, 22 Vt. 380; and it may be shown that the real consideration was of a different amount from that expressed in the deed: *Bowen v. Bell*, 20 Johns. 338; 11 Am. Dec. 286; *Belden v. Seymour*, 8 Conn. 804; 21 Am. Dec. 661; or of an entirely different character: *McCrea v. Purmort*, 16 Wend. 460; 30 Am. Dec. 103; and that the vendee agreed to pay an additional amount contingent upon some future event or transaction, as that upon a resale by him he would pay a portion of the proceeds that might be received in excess of the amount then paid by him: *Miller v. Kendig*, 55 Iowa, 174; *Michael v. Foil*, 100 N. C. 178; 6 Am. St. Rep. 577; or the whole of said proceeds: *Hall v. Hall*, 8 N. H. 129; or the excess above the advances then made by him: *Linscott v. McIntire*, 15 Me. 201; 33 Am. Dec. 602. In *Collins v. Tillou*, 26 Conn. 368, 68 Am. Dec. 398, the plaintiff had conveyed certain land to the defendant by an absolute deed, upon the verbal agreement by the defendant that he would sell the same and turn over the proceeds to the plaintiff; and it was held that this agreement of the defendant was not within the statute of frauds, and that after a sale by him the plaintiff could maintain *assumpsit* for the proceeds, and prove the agreement by oral testimony. In *Hess v. Fox*, 10 Wend. 437, the mortgagor conveyed the mortgaged premises to the mortgagee, and the mortgage was canceled, upon the verbal agreement of the mortgagee that he would sell the premises for the best price that could be got, and after deducting the amount of the mortgage debt, pay over the surplus of the sales to the mortgagor;

and the transaction was held not to be within the statute of frauds, and that *assumpsit* would lie for the surplus proceeds: See also *Reyman v. Mosher*, 71 Ind. 596; *Hodges v. Green*, 28 Vt. 358; *Goodspeed v. Fuller*, 46 Me. 141; 71 Am. Dec. 572; *Trowbridge v. Wetherbee*, 11 Allen, 361; *Price v. Sturgis*, 44 Cal. 591; *McCarthy v. Pope*, 52 Cal. 561.

The other rulings complained of were without error, and as the court did not err in receiving oral evidence of the agreement under which the property was conveyed to the defendant, and as the jury have found from such evidence that the defendant made the agreement as claimed by the plaintiff, judgment was properly rendered in accordance with such verdict.

The judgment is affirmed.

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**DEEDS — CONSIDERATION — PAROL EVIDENCE TO EXPLAIN.** — The consideration for a deed may be explained by parol evidence: *Buckley's Appeal*, 48 Pa. St. 491; 88 Am. Dec. 468, and note; note to *Thompson v. Thompson*, 68 Am. Dec. 649; *Rockhill v. Spraggs*, 9 Ind. 30; 68 Am. Dec. 607, and note; *Kintner v. Jones*, 122 Ind. 148. *Contra*, see *Salisbury v. Clarke*, 61 Vt. 453.

**DEEDS — EVIDENCE OF CONSIDERATION.** — A recital in a deed of land that the consideration has been paid is only *prima facie* evidence of payment: *Parker v. Foy*, 43 Miss. 260; 55 Am. Rep. 484; *Galland v. Jackman*, 28 Cal. 79; 85 Am. Dec. 172, and note; *Lloyd v. Lynch*, 28 Pa. St. 419; 70 Am. Dec. 137; *Nichols v. Nichols*, 133 Pa. St. 438; *Port v. Richey*, 128 Ill. 502. *Contra*, *Mendenhall v. Parish*, 8 Jones, 105; 78 Am. Dec. 269, and note.

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## MARYSVILLE ELECTRIC LIGHT AND POWER Co. v. JOHNSON.

[98 CALIFORNIA, 533.]

**CORPORATIONS — SUBSCRIPTIONS TO STOCK OF CORPORATION TO BE FORMED.**

— An agreement whereby the signers, for the purpose of forming a corporation and providing it with funds, declared that they subscribed for stock to the amounts set opposite their names, to be due and payable upon the formation of the corporation and the issuance of the stock, is valid; and upon the formation of the corporation and its acceptance of the agreement, each of the subscribers becomes bound to pay for the number of shares subscribed for by him.

**CORPORATION MAY SUSTAIN AN ACTION FOR SUBSCRIPTIONS** made to its stock before it was formed, though it is not named as a promisee in the agreement to subscribe.

**CORPORATION. — CONTRACT BETWEEN SEVERAL PERSONS TO AND WITH EACH OTHER** to form a corporation and subscribe to its stock is inchoate and incomplete until the contemplated organization is effected. Thereupon the corporation may accept the proposition offered by the several subscribers, and maintain actions to enforce their payment.

**CORPORATIONS — SUBSCRIPTIONS TO STOCK, WHEN PAYABLE.** — Though the statute provides that no assessment must exceed ten per cent of the amount of the capital stock of a corporation, except that if the whole has not been paid up and the corporation is unable to meet its liabilities, the assessment may be for the full amount of the unpaid subscriptions upon the capital stock, an agreement of subscription, whereby the subscribers agree that the amounts subscribed by them shall be due and payable on the formation of the corporation and the issuance of the stock, gives rise, on such formation, to a cause of action in favor of the corporation for the whole amount, without the levy of any assessment, though not then needed to satisfy the liabilities of the corporation.

**CORPORATION — PLEADINGS.** — In an action to recover the amount subscribed by the defendant to the stock of a corporation to be thereafter formed, it is not necessary to allege that he was named in the articles of incorporation as a subscriber. If he was not so named, that fact must be shown by his answer.

*C. A. Webb and W. G. Murphy, for the appellant.*

*W. H. Carlin, for the respondent.*

DE HAVEN, J. This is an action brought by the plaintiff against the defendant upon the following agreement, alleged to have been signed by him and others: "For the purpose of forming a corporation to have for its object the furnishing of the incandescent system of electric lighting to those who may desire the same, and to provide the funds for the purchase of the necessary plant, we, the undersigned, hereby subscribe for stock to the amount set opposite to our respective names. Amounts to be due and payable upon the formation of the company and the issuance of the stock."

The complaint alleges that the agreement was made and signed in contemplation of incorporating the plaintiff for the purpose of carrying on the business therein stated, and that thereafter it was duly incorporated under the laws of this state, by the defendant and the other persons signing said agreement. It is further alleged "that said corporation, this plaintiff, succeeded to and acquired all the rights of said subscribers, and each of them, to the amounts so subscribed," under the said agreement, and that plaintiff has issued its stock to the subscribers, and tendered to the defendant the amount of stock subscribed for by him, and that he has refused to pay for the same. It is also alleged that plaintiff "duly made," at different times, calls for fifteen, sixty, and twenty-five per cent of the amounts so subscribed by the defendant and others. The court below sustained a demurrer to the complaint, upon the ground that the facts therein stated are not sufficient to constitute a cause of action. This ruling

of the court presents the only question to be considered by us at this time.

1. The agreement above set out is certainly valid; the corresponding promises of the other signers, and the common object sought to be accomplished by all the parties to it, constitute a sufficient consideration for the promise of defendant; and upon the formation of the plaintiff corporation by the persons signing the agreement, and plaintiff's acceptance of the agreement, the defendant became bound to take and pay for the number of shares subscribed for by him: *Athol Music Hall Co. v. Carey*, 116 Mass. 471; *Red Wing Hotel Co. v. Friedrich*, 26 Minn. 112; *Hughes v. Antietam Mfg. Co.*, 34 Md. 816; *International Fair and Exposition Ass'n v. Walker*, 83 Mich. 386. And it is not material to the right of the plaintiff to maintain this action that it is not expressly named in such agreement as the promisee. The agreement is to be construed according to the evident intention of the parties to it. It just as clearly appears that it was the intention of all the parties that the promise of each should inure to the benefit of the corporation when formed as if such intention were expressly declared; and therefore, in legal effect, the promise of defendant was to pay to the plaintiff corporation when organized. The corporation really represents the parties to the agreement; it was brought into existence by them as an agent to carry on the business named in the agreement, and through which they were to secure the benefits to arise from their mutual and corresponding promises.

There is no difference in principle between the above contract signed by the defendant in this case, and that construed by the supreme court of Massachusetts in the case of *Athol Music Hall Co. v. Carey*, 116 Mass. 471. In that case the agreement was, that the parties signing it would form a corporation, and "pay to the treasurer of the corporation the amount of the several shares" subscribed for; and in speaking of such an agreement the court said: "In agreements of this nature, entered into before the organization is formed, or the agent constituted to receive the amounts subscribed, the difficulty is to ascertain the promisee, in whose name alone suit can be brought. The promise of each subscriber 'to and with each other' is not a contract capable of being enforced, or intended to operate literally as a contract to be enforced, between each subscriber and each other who may have signed previously, or who should sign afterwards, nor between each

subscriber and all the others collectively as individuals. The undertaking is inchoate and incomplete as a contract until the contemplated organization is effected, or the mutual agent constituted to represent the association of individual rights in accepting and acting upon the proposition offered by the several subscriptions. When thus accepted, the promise may be construed to have legal effect according to its purpose and intent and the practical necessity of the case, to wit, as a contract with the common representative of the several associates."

In *Ashuelot Boot and Shoe Co. v. Hoit*, 56 N. H. 548, certain persons signed the following paper: "The undersigned mutually agree that they will take and pay for the number of shares set against their respective names in the capital stock of a corporation to be organized under the general statute of New Hampshire, for the purpose of manufacturing boots," etc. Immediately following the names of those signing this agreement, the defendants in that action signed the following: "We, the undersigned, agree to pay in cash a gratuity of one thousand dollars." The plaintiff in that case was subsequently incorporated by the persons who had subscribed the above agreement to take its stock, and brought the action to recover the gratuity of one thousand dollars agreed to be paid by the defendants therein; and the court held that the action could be maintained, although the plaintiff was not named in the written promise of defendants to pay such gratuity, nor was it in existence when defendants signed the same. The court said: "The agreement was on the one part by the subscribers to the stock, of whom the plaintiffs are the successors, or rather, with the plaintiff,—for the understanding and agreement was that the subscribers to the stock should unite and form the plaintiff corporation,—and on the other part by the defendants."

So in this case, the agreement between the parties signing it was, in legal effect, that they would form the plaintiff corporation, and pay to it, as their common representative, the amount by them subscribed for its stock, and the plaintiff is therefore authorized to sue upon such agreement as a contract made for its benefit.

2. The averments of the complaint in regard to the assessments or calls made by plaintiff upon those signing the agreement do not add any strength to it, and may be disregarded as surplusage. There is in the complaint an entire failure to



state any facts showing that the plaintiff had the right under the statute to make assessments or calls in the amounts named, and it is evident that the action is not to recover assessments upon the subscribed capital stock of the plaintiff, but upon the agreement above set out.

Section 832 of the Civil Code, so far as the same applies to corporations like the plaintiff, declares: "No one assessment must exceed ten per cent of the amount of the capital stock named in the articles of incorporation, except in the cases in this section otherwise provided for, as follows: 1. If the whole capital of a corporation has not been paid up, and the corporation is unable to meet its liabilities or to satisfy the claims of its creditors, the assessment may be for the full amount unpaid upon the capital stock; or if a less amount is sufficient, then it may be for such a percentage as will raise that amount."

The respondent insists that if plaintiff is entitled to recover upon defendant's subscription to its capital stock as contained in the agreement under consideration, it cannot demand the full amount subscribed, unless the same is presently needed to meet its liabilities or to satisfy the claims of its creditors; and that as the complaint fails to show such a necessity, or that the plaintiff corporation is making an equal demand upon all the subscribers, the demurrer was properly sustained. This action, however, as we have seen, is not one brought under the statute to recover assessments upon the subscribed capital stock of the plaintiff, but is upon the agreement above set out, and that provides that the amount subscribed is "to be due and payable upon the formation of the company and the issuance of the stock"; and in this respect the agreement is similar to that considered by this court in *West v. Crawford*, 80 Cal. 19, and in relation to which the court, in its opinion by Works, J., said: "Here is a positive agreement on the part of the parties who subscribed to this stock to pay a fixed and certain sum of money at a certain time to a certain party. It is clear from the contract itself that it was not the intention that the liability to pay the sum of money named should in any way depend upon an assessment being made by the corporation after its organization. This is quite clear from the fact that the payment is fixed so soon after the organization of the company that such an assessment and its enforcement would have been impossible."

So in this case, the agreement of defendant was to pay the amount of his subscription upon the formation of the company

and the issuance of its stock, and not as the same might be called for under section 332 of the Civil Code, above quoted; and the agreement being a valid one, and this action being one to enforce it, the measure of defendant's liability is fixed by its terms, and not by the section of the code referred to.

The case of *California Sugar Mfg. Co. v. Schafer*, 57 Cal. 396, cited by respondent, is not in conflict with the conclusion we have reached upon this point. There the agreement was to take shares at five dollars each, "one dollar per share to be paid at the time of subscribing, and one dollar more per share every thirty days thereafter, until the whole five dollars shall be paid into the treasury, in case it is required."

The agreement in that case was made after the plaintiff therein was incorporated; the promise to pay the balance remaining after the first payment was not absolute, as is that of defendant here, but was conditional, and necessarily contemplated that calls should be made upon all alike, and no more should be collected from any one than his proportion, and the court construed the same as having been made with reference to the statute, which declares the circumstances under which corporations may by assessment call for payment of the full amount of their subscribed capital stock.

8. It is lastly claimed by the respondent that the complaint does not show that the defendant was named in the articles of incorporation as a subscriber for the stock of plaintiff, and that therefore the complaint is insufficient under the rule announced in *Monterey etc. R. R. Co. v. Hildreth*, 58 Cal. 123. It is sufficient to say upon this point that the complaint does not show that plaintiff's articles of incorporation failed to state that defendant was a subscriber to, or the amount of his subscription to, its capital stock. It is therefore good as against a general demurrer.

If, in the articles of incorporation, the offer of defendant to subscribe for shares of its stock, as contained in the agreement sued upon, was rejected, and the defendant thereby excluded as a share-holder, the fact must be shown by answer. Such a defense, if it exists, does not arise upon the face of the complaint in this action.

Judgment reversed.

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**CORPORATIONS — SUBSCRIPTIONS TO STOCK OF CORPORATION TO BE FORMED.**  
— A subscription by a number of persons to the stock of a corporation to be thereafter formed by them is a contract by the subscribers to become stockholders immediately upon the formation of the corporation, and as such is

binding and irrevocable from the date of the subscription, unless canceled by all of the subscribers before acceptance by the corporation: *Minneapolis etc. Co. v. Davis*, 40 Minn. 110; 12 Am. St. Rep. 701, and note; *Anderson v. Newcastle etc. R. R. Co.*, 12 Ind. 376; 74 Am. Dec. 212, and note.

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## **FRESNO NATIONAL BANK v. HAWKINS.**

[33 CALIFORNIA, 551.]

**OFFICER AND DEPUTY.** — **THE FORGERY OF ORDERS OR WARRANTS BY A DEPUTY** superintendent of county schools, and their sale to a banking corporation, is not in the line of his official duty, and therefore his principal is not answerable therefor.

**OFFICER'S LIABILITY FOR ACT OF DEPUTY.** — **THE INDORSEMENT ON FORGED ORDERS OR WARRANTS OF THE DATE OF THEIR FILING**, when the law requires warrants to be filed in the order of their presentation, is not a guaranty that the warrants so filed are genuine or will be paid. The indorsement does not give them negotiability, and one who purchases in reliance on the indorsement cannot recover of the officer whose deputy made it, on proof that the warrants were forged by such deputy.

*Church and Cory*, for the appellant.

*W. B. Tupper, H. H. Welsh, and Webb and Strother*, for the respondent.

**GAROUTTE, J.** This appeal is before us upon the judgment roll, and involves the sufficiency of the complaint. The complaint alleges that respondent was, at all the times mentioned, the county superintendent of schools of Fresno County, and that W. R. Bibby was the regularly appointed deputy of such superintendent; that appellant, as was its custom, purchased, at the instance and request of respondent, by his deputy, certain school-warrants; that said warrants were purchased solely on the faith and credit of the indorsements thereon by the respondent; that said warrants, except the indorsement of filing, were forged by the said Bibby, deputy, and were void and of no effect; and appellant claims to be damaged to the extent of the money paid out for such forged warrants. As appears by the exhibits attached to the complaint, these forged warrants were orders on the county superintendent by the trustees of the various school districts for requisitions to the county auditor; and the word "warrants," as used in the complaint, is somewhat of a misnomer. The indorsement, which appellant alleges to be genuine, and upon the sole faith of which it expended its money, made upon these orders, was the memo-

randum of the date of filing in the county superintendent's office.

Neither the forgery of the orders by Bibby, nor his presentation and sale of them to the bank, created any liability against respondent; for in those matters he was not acting in the line of his official duty, and by virtue of his appointment as deputy was not clothed with any such power. Respondent could only clothe his deputy with such power as the statute conferred upon himself, and the powers here exercised were not conferred. Again, the bank knew the measure of respondent's power, and the limitation of his official duties; if not, it should have known them, for all persons are held to know the law. It follows that the only act done by the deputy in the line of his official duty toward consummating the fraud alleged was the indorsement of the date of filing upon the orders. The law requires these orders to be filed as they are presented, so that the requisitions upon the auditor will follow in the same order of time. The filing of the order in the office of the county superintendent is not a guaranty by such officer that such order is genuine, and will be paid in due course of time. The filing-marks do not warrant that it is not forged, but simply indicate to the world that such a paper was filed in the office at a time named. Manifestly such fact can create no personal liability against respondent in favor of a purchaser of such orders. Appellant alleges that he purchased the orders on the sole faith and credit of the genuine indorsement thereon; but, as we have already seen, such indorsement neither gave them negotiability nor validity, and aside from fixing the date of their filing in the superintendent's office, no additional value.

Let the judgment be affirmed.

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**OFFICERS — LIABILITY FOR ACTS OF SUBORDINATES.** — Statements made by a deputy sheriff in relation to the title to property offered for sale at execution sale is not within the scope of his authority, and the sheriff will not be liable for such statements: *Lewark v. Carter*, 117 Ind. 206; 10 Am. St. Rep. 40. Public officers are not answerable for the misconduct or malfeasance of subordinates whom they are obliged to employ: *Bailey v. Mayor*, 3 Hill, 531; 33 Am. Dec. 669, and note.

[IN BANK.]

STEPHENSON v. SOUTHERN PACIFIC COMPANY.

[98 CALIFORNIA, 558.]

**MASTER AND SERVANT. —** IF A SERVANT ACTS WITHOUT REFERENCE TO THE SERVICE in which he is employed, to effect some independent purpose of his own, his master is not answerable. The test of the master's responsibility for the act of his servant is, not whether such act was done according to the instructions of the master to the servant, but whether it was done in the prosecution of the business which the servant was employed by the master to do.

**MASTER AND SERVANT — ACT DONE TO FRIGHTEN. —** An engineer in charge of a locomotive, who, with intent to frighten passengers on a street-car, backs the locomotive towards and so near such car that they become frightened, and jump off and are injured, is not acting in the prosecution of his master's business, and the latter, therefore, is not liable for the damages resulting to such passengers.

**MASTER'S LIABILITY FOR TORT OF SERVANT. —** If a servant steps aside from his master's business, for however short a time, to commit a wrong not connected with such business, the relation of master and servant is, for the time being, suspended, and therefore the master is not answerable for the wrong.

*John D. Bicknell*, for the appellant.

*Wells, Monroe, and Lee*, for the respondent.

DE HAVEN, J. The action is to recover damages for personal damages alleged to have been sustained by plaintiff through the negligence of defendant. The complaint alleges that the plaintiff was a passenger upon a street-car in the city of Los Angeles, the track of which crosses that of defendant at or near its depot, and that upon the occasion of the injury the street-car approached the crossing, and stopped long enough to ascertain that a locomotive-engine on the track of defendant, and within about twenty-five feet of the crossing, was not in motion, and then proceeded to cross the track; that when the street-car was about to cross the track of defendant, the engineer in charge of defendant's engine negligently and carelessly gave his engine steam, and commenced to back the said locomotive upon the track toward and upon the street-car in which plaintiff was riding, and that plaintiff, being in imminent danger of injury from the anticipated collision, jumped from the street-car, as did other passengers, and was injured.

The answer contained a sufficient denial of any negligence upon the part of defendant and of its employees, and also charged that plaintiff was guilty of contributory negligence.

The trial was by jury, and a verdict rendered in favor of

plaintiff for five thousand dollars. The defendant appeals. The evidence tended to show that the street-car was stopped before attempting to cross the track of defendant, as alleged in the complaint; that the locomotive was not then in motion, but proceeded to back down toward the crossing as the street-car was crossing the track, but did not in fact come in collision with the street-car. The locomotive-engine was upon the depot-grounds for the purpose of being used in switching cars.

The court, at the request of plaintiff, gave to the jury the following, among other instructions: —

“If the jury believe from the evidence that the defendant’s engineer, with intent to frighten and scare the passengers riding upon said street-car upon which plaintiff was a passenger, while the said horse-car was in close proximity on the track of said defendant, unnecessarily and wantonly let the engine take steam, and started said locomotive to move towards and upon said street-car, with the intention thereby to frighten the said passengers, of which plaintiff was one, and did thereby frighten said passengers and plaintiff, so that she, seeing said engine, and believing, and having reasonable cause to believe, that the same was about to collide with said street-car, in order to save herself from accident jumped off of said car, and thereby the plaintiff was injured, then the defendant is guilty of negligence, and the jury should find for the plaintiff.”

In giving this instruction the court committed an error. The rule is, of course, well-settled that the master is civilly liable for the wrongful or negligent act of the servant, committed while in his service and within the scope of his employment, — that is, in the transaction of the master’s business. And the converse of the rule is equally well settled, that when a servant acts without any reference to the service for which he is employed, and not for the purpose of performing the work of his employer, but to effect some independent purpose of his own, the master is not responsible in that case for either the act or omission of the servant: *Mott v. Consumers’ Ice Co.*, 78 N. Y. 548; *Rounds v. Delaware etc. R. R. Co.*, 64 N. Y. 129; 21 Am. Rep. 597; *Aycrigg v. New York etc. R. R. Co.*, 30 N. J. L. 460; *Snyder v. Hannibal etc. R. R. Co.*, 60 Mo. 418; *Cosgrove v. Ogden*, 49 N. Y. 257; 10 Am. Rep. 361; *Howe v. Newmarch*, 12 Allen, 49; *Little Miami R. R. Co. v. Wetmore*, 19 Ohio St. 110; 2 Am. Rep. 873. “The test of the master’s responsibility for the act of the servant,” said Grover, J., in delivering the opinion of

the court in *Cosgrove v. Ogden*, 49 N. Y. 257, 10 Am. Rep. 361, "is, not whether such act was done according to the instructions of the master to the servant, but whether it was done in the prosecution of the business that the servant was employed by the master to do." In *Howe v. Newmarch*, 12 Allen, 49, as the final conclusion of an elaborate opinion in which many cases bearing upon the subject are considered, the test of the master's responsibility for the act of his servant is thus stated: "And in an action of tort in the nature of an action on the case, the master is not responsible if the wrong done by his servant is done without his authority, and not for the purpose of executing his orders or doing his work. So that if the servant, wholly for a purpose of his own, disregarding the object for which he was employed, and not intending by his act to execute it, does an injury to another, not within the scope of his employment, the master is not liable. But if the act be done in the execution of the authority given him by his master, and for the purpose of performing what the master has directed, the master will be responsible, whether the wrong done be occasioned by negligence, or by a wanton or reckless purpose to accomplish the master's business in an unlawful manner."

The instruction given by the court below, and now under consideration, is in conflict with the rule of law as above stated. The engineer was not acting within the scope of his employment, as assumed in this instruction, if his object in moving the engine was simply to frighten the passengers in the street-car. Such an act done for such a purpose was entirely foreign to the objects of his employment. The work which the engineer was to perform for defendant was to manage the engine while it was engaged in switching cars, and if he started the engine, not for the purpose of employing it in the service of the defendant, but to accomplish an independent purpose of his own, of the character stated in the instruction, the relation of master and servant, as to that particular act, did not exist, and the defendant would not be liable for any damage resulting therefrom, and it is immaterial that he used the engine of defendant in order to accomplish his unlawful purpose: *Wharton on Negligence*, sec. 168; *Little Miami R. R. Co. v. Wetmore*, 19 Ohio St. 110; 2 Am. Rep. 373.

It would not be contended that one who employs another to sprinkle his garden, and places in his hands a hose to be used for that purpose, would be civilly responsible in damages if, stepping aside from that employment, the servant should,



either in sport or from malice, turn the same upon a person quietly passing along the street. In the commission of such an assault the servant would not be acting within the scope of his employment, nor would the hose be used in the transaction of the business of his employer. And yet the act of the servant in the illustration just given would not be more foreign to the purpose of his employment than was that of the engineer in this case, if committed under the circumstances stated in the instruction. The rule of law which makes the master liable to respond in damages for the act or omission of the servant "implies that the master will not in any case be liable for wrongs committed by the servant while not acting within the scope of his authority. This rule is so reasonable that the grounds on which it rests need scarcely be suggested. In all the affairs of life, men are constantly obliged to act by others; but no one could venture to so act if the mere circumstance that he employed another to act for him about any general or particular business made him an insurer against all wrongs which such persons might possibly commit during the period of such employment. . . . In other words, if the servant steps aside from his master's business, for how short a time soever, to commit a wrong not connected with such business, the relation of master and servant will be for the time suspended": 2 Thompson on Negligence, 885, 886.

The evidence in this case tending to show the facts referred to in the instruction under consideration is very slight, and that part of it consisting of the opinion of one of the witnesses that the intention of the engineer was only to frighten the the passengers on the street-car is not competent for the purpose of proving such fact. The case was, however, tried upon the theory that there was sufficient evidence upon which to base the instruction, and we are not able to say that there was such an entire want of evidence upon that point that the instruction was without prejudice to the defendant.

Judgment and order reversed.

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**MASTER AND SERVANT — LIABILITY OF MASTER FOR TORTS OF SERVANT.** — A master is not liable for the independent trespass of his servant not done in the course of the service; but the master is civilly liable for the manner in which the servant does the work he is employed to do, although the manner in which he does it is contrary to his instructions: *McOlung v. Dearborne*, 134 Pa. St. 396; 19 Am. St. Rep. 708, and note; *Golden v. Neubrand*, 52 Iowa, 59; 35 Am. Rep. 257; *New Orleans etc. R. R. Co. v. Harrison*, 48 Miss. 112; 12 Am. Rep. 356, and note; note to *Savannah etc. R. R. Co. v. Bryan*, 22 Am. St. Rep. 464; note to *Kansas City etc. R. R. Co. v. Kelly*, 59 Am. Rep. 601.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**GEORGIA.**

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**PENDLETON v. HOOPER.**

[87 GEORGIA, 102.]

**EXEMPTIONS — RIGHT OF, WHEN SUPERIOR TO JUDGMENT. —** A party who, as the head of a family, is entitled to claim an exemption in land does not lose his right, as against the lien of a judgment for debt rendered against him, by subsequently conveying the land by deed of gift, when he has never parted with the possession. His possession is sufficient to maintain his exemption claim as against the lien of the judgment.

**EXEMPTIONS. — MERE POSSESSION OF LAND** by one entitled to an exemption right therein is sufficient to sustain the exemption as against debts, judgments, or other inferior liens.

*Rosser and Carter*, for the plaintiff.

*H. C. Jones and J. N. Glenn*, for the defendant.

**BLECKLEY, C. J.** The premises in controversy consist of six acres, and are of the estimated value of four hundred dollars. Hooper was in possession when the judgment against him was rendered, and has remained in possession ever since. He parted with the paper title by a voluntary conveyance made to several persons, some of them minors, on the day the judgment was rendered and at an hour subsequent to its rendition. The lien of the judgment was made neither better nor worse by this conveyance. Had he parted also with possession and never resumed the same, his ownership of the property would have been at an end, but as he retained possession, he is still the owner against all the world except his donees. They may choose never to disturb him or assert any title against him. That possession of land imports ownership is familiar law: 2 Bla. Com. 196; *English v. Register*, 7 Ga. 391. Naked posses-

sion is the lowest and most imperfect degree of title, but it is nevertheless enough to hold off creditors where exemption is claimed under section 2040 of the code, and where the terms prescribed in section 2041 are complied with. Here there was a compliance with these terms pending the levy, and whilst Hooper was in possession. It is not disputed that he was the head of a family, or that he would be entitled to the exemption if he had not divested himself of all title except possession. But he retained the very thing which the law of exemption is solicitous to protect. It cares not how little interest the debtor may have, so long as he remains in its actual enjoyment. The exempt land is "for the use and benefit of the family of the debtor,"—so says the code. The exemption does not depend on the quality or duration of the estate which the debtor has in the land. A tenancy at will or at sufferance will protect it from levy and sale as his property equally with an estate in fee-simple. The exemption attaches to the land, not merely to his estate in it. Our exemption laws do not cut up exempt property into divers estates, but protect the physical thing as a whole from levy and sale so long as the exemption continues: *Van Horn v. McNeill*, 79 Ga. 122, 123. Of course it is not meant to say that if others had an interest in the property as well as the debtor who has claimed the exemption, the property would not be subject to sale so far as their interest is concerned. But a forced sale of an exempt thing, whether it be land or personalty, cannot be made as the property of the debtor against his claim of exemption whilst he is the head of a family and holds possession, unless the debt be one which for some reason overrides the exemption. The law devotes the thing to the use and benefit of the family as against the ordinary rights of his creditors. Some debts are superior to the exemption right, but the one involved in this case is not of that class. How, then, can the land be consistently treated as the property of the debtor for the purpose of subjecting it to sale, and not so treated for the purpose of exempting it? The creditor's lien being inferior to the debtor's right to have the enforcement of the lien suspended, of what concern to the creditor is it that the debtor has no title to the land as against third persons to whom he has conveyed it by a deed of gift? Even were he a trespasser relatively to his donees, he would, whilst in possession, be owner relatively to his creditors.

The court below decided the case correctly.

Judgment affirmed.

**EXECUTIONS — EXEMPTIONS FROM — SUPERIOR RIGHT OF. —** A sheriff or other officer has no right to take from a debtor, by virtue of process against him, his property which by law is exempt: *People v. Clements*, 68 Mich. 655; 13 Am. St. Rep. 573, and note. A debtor who was unmarried when a judgment was obtained against him, and whose property was levied upon under an execution issued on the judgment, has a right to claim the benefit of the exemption laws, if, between the date of the levy and the sale, he marries and becomes a householder: *Robinson v. Hughes*, 117 Ind. 293; 10 Am. St. Rep. 45. Exemption statutes are to be liberally construed in favor of debtors: *Collier v. Murphy*, 90 Tenn. 300; 25 Am. St. Rep. 698, and note. See *Ketchin v. McCarley*, 26 S. C. 1; 4 Am. St. Rep. 674, and note.

**POSSESSION AS EVIDENCE OF TITLE AGAINST JUDGMENT CREDITOR. —** Where a judgment creditor asserts a lien upon land occupied by a tenant of the judgment debtor, such creditor is charged with constructive notice of the respective rights and interests of the tenant and of his landlord: *Wilkins v. Butler*, 43 Minn. 213; 19 Am. St. Rep. 233.

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## McLEOD v. SWAIN.

[87 GEORGIA, 156.]

**EVIDENCE. — DECLARATIONS OF DECEASED OWNER** of land, made while in possession, and in disparagement of his title thereto, are admissible in evidence, not only against him and those claiming under him, but also for or against strangers.

*Williams and Brannen, Saffold and Warren, T. H. Potter, and T. B. Felder, Jr.,* for the plaintiffs in error.

*Twiggs and Verdery, and H. R. Daniel,* for the defendant in error.

LUMPKIN, J. Mrs. Swain brought an action of ejectment against McLeod et al. for the recovery of a tract of land in Emanuel County. The evidence was conflicting, and sufficient to sustain a verdict for either side. The jury found for the plaintiff. After Mrs. Swain had proved by her own testimony that a certain Mrs. Wiggins, who at one time was in possession of the land, and remained in possession for many years until her death, was her tenant, the court, over defendants' objection, admitted proof of declarations made by Mrs. Wiggins, while in possession of the land, to the effect that she held it as the tenant of plaintiff, and that it was the land of plaintiff. The only question of law presented in this case for our determination is, whether or not this testimony was properly admitted.

Section 3776 of the code declares that "the declarations and entries of a person, since deceased, against his interest,

and not made with a view to pending litigation, are admissible in evidence in any case." It was contended in the argument that such declarations should be received only against the declarant and those in privity with or claiming under him, but this view does not seem to be sustained by the authorities. It was held in the case of *Peaceable v. Watson*, 4 Taunt. 15, that "the declarations of a deceased occupier of land, of whom he held the land, are evidence of the seisin of that person"; and in *Davies v. Pierce*, 2 Term Rep. 53, that "declarations by tenants are admissible evidence after their death to show that a certain piece of land is parcel of the estate which they occupied." In both these cases, the declarations admitted were made by persons not in privity with any of the parties to the record, nor did any of such parties in any way claim title through or under the declarants. Again: "Statements of a deceased occupier touching his title are admissible in evidence generally, without reference to the particular effect they may produce in the cause": *Carne v. Nicoll*, 27 Com. Law Rep. 446; 1 Scott, 466. See also *Barry v. Bebington*, 4 Term Rep. 514.

We find the following in 1 Taylor on Evidence, section 684: "Under the head of declarations against proprietary interest may be classed the statements made by persons while in possession of land, explanatory of the character of their possession; and it is now well settled that such declarations, if made in disparagement of the declarant's title, are receivable, not only as original admissions against himself and all persons who claim title through him, but also as evidence for or against strangers. Whether in this latter event they are admissible in the lifetime of the declarant, or only in cases where his death can be proved, is a point which does not appear to have been distinctly decided. In most of the cases where the evidence has been received, the declarant was dead; but on two occasions, at least, the evidence was admitted though the declarant was living." Wharton also lays down the rule that such evidence is admissible, not only against privies, but strangers. "The reason for this conclusion is, that possession implies, *prima facie*, an absolute interest, and any statement which would tend to limit it to a less interest is self-dissevering": 2 Wharton on Evidence, sec. 1156. The same principle is stated in 1 Greenleaf on Evidence, section 109, and the same reason for the admissibility of such declarations is there given.

These authorities abundantly sustain the correctness of the

ruling made by the court below, and its judgment is therefore affirmed.

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**EVIDENCE — DECLARATIONS OF DECEASED AN.** — Admissions of an ancestor in a letter, to the effect that he had conveyed the property to the defendant, are competent evidence in favor of the defendant and against the heirs of such ancestor: *Terry v. Rodahan*, 79 Ga. 278; 11 Am. St. Rep. 420, and note. In a suit by an executor to recover rents from a person in possession of property for a number of years, parol evidence of the testator's declarations that such person was to pay no rent are admissible: *Cox v. Baird*, 11 N. J. L. 105; 19 Am. Dec. 386. Declarations of a deceased owner of land may be proved, not in support of his title, but to reply to testimony that he had never claimed the land: *Booser v. Teague*, 27 S. C. 349.

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## ATLANTA AND FLORIDA R. R. Co. v. KIMBERLY.

[87 GEORGIA, 161.]

**MASTER AND SERVANT — EMPLOYER'S LIABILITY FOR NEGLIGENCE OF INDEPENDENT CONTRACTOR.** — When an individual or corporation contracts with another individual or corporation exercising an independent employment for the latter to do a work not in itself unlawful or attended with danger to others, such work to be done according to the contractor's own methods, and not subject to the employer's control or orders, except as to the results to be obtained, the employer is not liable for the wrongful or negligent acts of the contractor or his servants.

**MASTER AND SERVANT — EMPLOYER WHEN LIABLE FOR INDEPENDENT CONTRACTOR'S ACTS.** — When work is wrongful in itself, or if done in the ordinary manner must result in a nuisance, the employer is liable for injury resulting to third persons, although the work is done by an independent contractor.

**MASTER AND SERVANT — INDEPENDENT CONTRACTOR — LIABILITY OF EMPLOYER.** — Where, according to previous knowledge and experience, the work to be done by an independent contractor is in its nature dangerous to others, the employer, and not the contractor, is liable for an injury inflicted in the performance of the work; and the rule is the same when the wrongful act done by the contractor is the violation of a duty imposed by express contract or by statute upon the employer.

**MASTER AND SERVANT — INDEPENDENT CONTRACTOR — LIABILITY OF EMPLOYER.** — An employer may make himself liable for the negligence of an independent contractor by retaining the right to direct and control the time and manner of executing the work, or by interfering with the contractor and assuming control of all or part of the work, so that the relation of master and servant arises, or so that the injury is traceable to his interference. But mere supervision to ascertain that the contractor performs his contract, or reserving the right to dismiss incompetent workmen, will not render the employer liable.

**MASTER AND SERVANT — INDEPENDENT CONTRACTOR — LIABILITY OF EMPLOYER.** — An employer is liable when he has ratified or adopted the unauthorized acts and wrongs of an independent contractor.

**MASTER AND SERVANT — INDEPENDENT CONTRACTOR — RATIFICATION — LIABILITY OF EMPLOYER FOR NUISANCE CREATED BY.** — A railroad company, which has employed an independent contractor to construct its road, retaining no control over him, except to see that the road is built according to contract, is not liable for an injury resulting from a nuisance created by such contractor, not necessarily incident to the construction of the road; and if the company is not aware of the existence of the nuisance, and the possession of the road has not been delivered to it at the time of the injury complained of, there is no such ratification of the contractor's wrongful acts as will render it liable therefor.

**MASTER AND SERVANT — INDEPENDENT CONTRACTOR — LIABILITY OF EMPLOYER FOR NEGLIGENCE OF.** — Where a railroad company lawfully employs an independent contractor to construct its road, retaining no control over him or the work, he is not the agent or servant of the company, and it is presumed that he will do the work in a lawful manner. If he does it illegally, he, and not the company, is liable therefor.

**MASTER AND SERVANT — INDEPENDENT CONTRACTOR — LIABILITY OF CORPORATE EMPLOYER.** — A railroad company may employ an independent contractor to construct its road, and a contract of this character is not such a delegation of its chartered rights as will render the company liable for the unauthorized wrongs of the contractor or his servants while engaged in the work.

**EVIDENCE — PLEADINGS — VARIANCE.** — Where a witness testifies that four named causes produced the injury complained of, while the complaint alleges but two, it is error to strike out that part of the evidence not covered by the pleadings and allow the remainder to stand. The whole evidence should be stricken out; but such error is cured by the subsequent consent of all parties that the whole evidence might stand as first introduced.

*Payne and Tye, and N. J. and T. A. Hammond*, for the plaintiff in error.

*John C. Reed, and Dorsey, Brewster, and Howell*, for the defendant in error.

**SIMMONS, J.** Kimberly sued the railroad company for damages, and alleged in his declaration that while the company was constructing its road, it made a deep cut and piled the fresh earth therefrom near his dwelling-house, and dammed up a small stream and ponded the water therefrom near the house; and that it also stationed near the house a camp of convicts whom it was using in said construction, and permitted the filth accumulating in the sinks of this camp, and otherwise therein from the convicts, to flow from the camp and be deposited a few yards from the house; by reason of which the air in and around the house became infected with noxious scents, malaria, and other substances injurious to health, whereby plaintiff and his wife both became sick and endured great pain and suffering, and were unable to attend to their



daily duties, etc. The defense of the railroad company was, that it did not do the acts complained of in the declaration; that if they were done at all, they were done by the Chattahoochee Brick Company, an independent contractor which it had employed to build the railroad from Atlanta to Senoia. On the trial of the case, the jury found a verdict for the plaintiff, and the defendant made a motion for a new trial on the various grounds set out therein, which was overruled, and it excepted.

The main question argued before us was, whether, under the facts of this case, the railroad company was liable for the damages sustained by Kimberly. The general rule of law upon this subject is: Where an individual or corporation contracts with another individual or corporation exercising an independent employment for the latter to do a work not in itself unlawful or attended with danger to others, such work to be done according to the contractor's own methods, and not subject to the employer's control or orders, except as to the results to be obtained, the employer is not liable for the wrongful or negligent acts of the contractor, or of the contractor's servants: Code, sec. 2962; *Harrison v. Kiser*, 79 Ga. 588. And see the following text-books and cases therein cited: 1 Lawson's Rights, Remedies, and Practice, sec. 295; 2 Thompson on Negligence, 899 et seq., 909-913; 2 Wood's Railway Law, sec. 284; also 1 Addison on Torts, 802; Cooley on Torts, 644; Bishop on Non-Contract Law, sec. 606; Pierce on Railroads, 286-291; 1 Rorer on Railroads, 468-470; Whittaker's Smith on Negligence, 171 et seq.; Wood on Nuisances, sec. 77, p. 81; Dicey on Parties, 2d Am. ed., 468 et seq. See especially the following cases: *Peachey v. Rowland*, 22 L. J. 81; 18 Com. B. 182; *Cuff v. Newark etc. R. R. Co.*, 85 N. J. L. 17; 10 Am. Rep. 205; *Clark v. Hannibal etc. R. R. Co.*, 36 Mo. 202; *McCafferty v. Spuyten Duyvil etc. R. R. Co.*, 61 N. Y. 178; 19 Am. Rep. 267; *Hughes v. Cincinnati etc. R'y Co.*, 39 Ohio St. 461; *Hilliard v. Richardson*, 3 Gray, 849; 63 Am. Dec. 748; *Eaton v. European etc. R'y Co.*, 59 Me. 520; 8 Am. Rep. 480; *Wabash etc. R'y Co. v. Farver*, 111 Ind. 195; 60 Am. Rep. 696; *Kansas Cent. R'y Co. v. Fitzsimmons*, 18 Kan. 84; *Painter v. Pittsburgh*, 46 Pa. St. 220.

To the general rule there are several exceptions.

1. Where the work is wrongful in itself, or if done in the ordinary manner would result in a nuisance, the employer will be liable for injury resulting to third persons, although the work is done by an independent contractor. This is upon

the principle that if one contracts with another to commit a nuisance, he is a co-trespasser by reason of his directing or participating in the work. In other words, the rule is, that "if the act or neglect which produces the injury is purely collateral to the work contracted to be done, and entirely the result of the wrongful acts of the contractor and his workmen, the proprietor is not liable; but if the injury directly results from the work which the contractor engaged and was authorized to do, he is equally liable with the contractor": 2 Thompson on Negligence, 903. See also authorities cited *supra*.

2. If, according to previous knowledge and experience, the work to be done is in its nature dangerous to others, however carefully performed, the employer will be liable, and not the contractor, because, it is said, it is incumbent on him to foresee such danger and take precautions against it; and this is the principle upon which the cases of *Bower v. Peate*, L. R. 1 Q. B. Div. 321, *Tarry v. Ashton*, L. R. 1 Q. B. Div. 314, and *Pickard v. Smith*, 10 Com. B., N. S., 470, relied on by the defendant in error, were decided. And in this exception is included the principle that where the injury is caused by defective construction which was inherent in the original plan of the employer, the latter is liable: See authorities cited *supra*; also *Robbins v. Chicago*, 4 Wall. 657; *Boswell v. Laird*, 8 Cal. 469; 68 Am. Dec. 345; *Lancaster v. Connecticut M. L. Ins. Co.*, 92 Mo. 460; 1 Am. St. Rep. 739. For instance, if a person employs another to erect a building, and the plan of the building is defective, the walls being too thin and weak, and the building while in process of erection falls and causes injury to a third person, the employer, and not the contractor, is liable. Or if a contractor is employed to build a sewer, and the employer agrees to furnish the materials, and the sewer-pipe furnished by the employer is too small, and damage is sustained by reason thereof, the employer is liable.

3. The next exception is where the wrongful act is the violation of a duty imposed by express contract upon the employer; for where a person contracts to do a certain thing, he cannot evade liability by employing another to do that which he has agreed to perform. For instance, where a company undertook to lay water-pipes in a city, agreeing with the city that it would "protect all persons against damages by reason of excavations made by them in laying pipes, and to be responsible for all damages which might occur by reason of the neglect of their employees in the premises," and the company

let out the work to a contractor who used a steam-drill in such a manner as to frighten a traveler's horse and injure the traveler, it was held by the supreme court of the United States that the company was liable: *Water Co. v. Ware*, 16 Wall. 566.

4. The next exception is where a duty is imposed by statute. The person upon whom a statutory obligation is imposed is liable for any injury that arises to others from its non-performance, or in consequence of its having been negligently performed, either by himself or by a contractor employed by him. Thus where the statute imposed upon a railroad company, as a duty to the proprietors of inclosures through which the road passed, the obligation of placing stock-guards and preserving or supplying fences on the right of way, and protecting the inclosure from injury in the construction of its road, the company was held liable for the failure to perform such duty, though resulting from the negligence of a contractor: *Houston etc. R. R. Co. v. Meador*, 50 Tex. 77. And it was upon this principle that the cases of *Wilson v. White*, 71 Ga. 506, 51 Am. Rep. 269, *Gray v. Pullen*, 5 Best & S. 970, *Hole v. Sittingbourne etc. R'y Co.*, 6 Hurl. & N. 488, and *Chicago etc. R. R. Co. v. McCarthy*, 20 Ill. 388, relied upon by counsel for the defendant in error, were decided. And the case of *Hinde v. Wabash Navigation Co.*, 15 Ill. 72, also relied upon for the defendant in error, falls under the same principle. In that case the charter imposed upon the company the duty of paying for all material taken for the use of its work, and expressly gave a remedy against the company; and it was held that the company could not, by delegating its work to a contractor, escape liability for material taken by him for the work; especially as he was working under the immediate supervision and direction of the engineer of the company.

5. The employer may also make himself liable "by retaining the right to direct and control the time and manner of executing the work, or by interfering with the contractor and assuming control of the work, or of some part of it, so that the relation of master and servant arises, or so that an injury ensues which is traceable to his interference. But merely taking steps to see that the contractor carries out his agreement, as having the work supervised by an architect or superintendent, does not make the employer liable; nor does reserving the right to dismiss incompetent workmen": 1 Lawson's Rights, Remedies, and Practice, sec. 299; *Harrison v. Kiser*, 79 Ga. 588.

6. The employer may also be held liable upon the ground that he has ratified or adopted the unauthorized wrong of the independent contractor: See *Harrison v. Kiser*, 79 Ga. 588; 2 Thompson on Negligence, 903, 915.

Applying the foregoing principles to the facts of this case, we find that the railroad company made a contract with the Chattahoochee Brick Company, whereby the latter agreed to build the former's road from Atlanta to Senoia according to certain specifications; and the railroad company did not retain any control over the contractor as to the method or manner of doing the work. The construction company was to furnish the labor and all the materials, including the pipes with which the sewers or culverts were to be built. All the control reserved by the road was, that its superintendent was to see that the road was built according to the contract. There is no indication in the record, outside of some loose and illegal declarations of third parties, the admission of which as evidence we will speak of presently, tending to show that the railroad company had any authority, power, or control over the construction, as to the manner or means of doing the work. This being true, the railroad company, under the general rule above announced, is not liable for the negligent acts done by the contractor. It was argued by the able counsel for the defendant in error that the building of a railroad necessarily results in a nuisance, unless certain precautions are taken to prevent it; that the low places by which the surrounding lands are drained, and from which the water is carried off, must be filled up, and unless certain precautions are taken to provide an escape for the water, a nuisance necessarily results; and that the railroad company cannot escape liability by having the work done by an independent contractor. If the premises of counsel are true, the conclusion might also be true; but if a railroad is built properly, we do not think any nuisance will result from the building. The company, under its charter, had authority of law to do this work; and when it contracted with the construction company, it was of course implied that the latter would do the work in a proper and lawful manner. "A person employing another to do a lawful act is presumed, in the absence of evidence to the contrary, to have employed him to do it in a lawful and reasonable manner; and therefore, unless the parties stand in the relation of master and servant, the employer is not responsible for damages occasioned by the negligent mole in

which the work is done": 1 Redfield on Railways, 6th ed., 542. Moreover, the evidence shows that in the very place where this nuisance is said to have occurred, the railroad company had provided means, which, if used, would have prevented the nuisance. The superintendent directed that a waste-way should be placed there, but the contractor put in a pipe, which the defendant claims was one of the causes of the nuisance,—1. By being too small to carry off the water in proper time; and 2. Because it was not put upon the bed of the stream, but several inches above the bed, thereby causing the water to pond near the plaintiff's house. Nor would the other things which it is claimed caused the nuisance, to wit, the throwing up of the fresh dirt, the convict camp, and the hog and horse lot, render the railroad liable. It had lawful authority for excavating the hills and filling the bottoms in order to make its road-bed. And the placing of the convict camp and the hog and horse lot near the plaintiff's house was the act of the construction company, over which, it appears from the record, the railroad company had no power or control. So it will be seen that the work committed to the construction company was not wrongful *per se*, nor did it necessarily result in a nuisance, and therefore does not fall within the first exception to the general rule. Nor is there any legal evidence to show that it would fall within the second exception. It is claimed that the pond of water was caused by the sewer-pipe being too small to carry it off, but there is no evidence that the railroad company directed that this particular size of pipe should be placed at that point. It is true, there are some declarations of Hammond and English to the effect that the superintendent ordered it to be put there; but these declarations were illegal, and should have been excluded. If it should be shown, upon the next trial, that this particular size of pipe was placed at that point by direction of the company, or if the specifications in the contract required it to be placed there, and it should be further shown that this part of the plan was inherently defective, and that it caused this nuisance, and the plaintiff sustained injury thereby, the railroad company would be liable. But if the railroad company did not direct this particular size of pipe to be placed at that point, or its plans and specifications did not require it, and it was put there by the contractor according to his own judgment, and negligently placed above the bed of the stream, then the railroad company would not be liable, although it

may have had notice from the plaintiff that, in his opinion, the pipe was too small. If the railroad company had no control over the contractor as to the manner in which he should build the sewer or put in the pipe, any notice which the plaintiff might give its officers would not make it liable. The contractor being in an independent employment, whatever he does outside of or beyond his contract is a collateral act, for which the employer is not liable. He is not the servant or agent of the employer, and the employer cannot be held liable for any acts of negligence committed or omitted by him outside of his contract. Where the work he is engaged to do is lawful, the law presumes that he will do it in a lawful manner; and if he does it illegally, he is liable, and not the employer.

Nor do the facts of the case bring it within the third or the fourth exception. There was no duty imposed upon the railroad company, either by contract or by statute, to do this particular work, or to do it in a particular way. Its charter does not impose upon it the duty of building the road, and does not specify the manner in which it shall be built; nor is any liability imposed upon it for acts of the kind complained of in this case. The authorities all hold that a railroad company has the right to make a contract with other parties for the construction of its road, and it is held that a contract of this character is not such a delegation of its chartered rights as to render the company liable for unauthorized wrongs committed by the contractor or his servants while engaged in the work. "The principle that a railroad company cannot delegate to an employee its chartered rights and privileges, so as to exempt it from liability, does not extend to the use of the ordinary ways and means for the construction of the road, but to the use of such extraordinary powers only as the company itself could not exercise without having first complied with the conditions of the legislative grant of authority. Thus, after having first procured the right of way, the company can delegate to another lawful authority to enter upon the same and make its road-bed and perform other proper acts of construction; but it cannot delegate such lawful authority without having first secured the right of way by donation, purchase, or the exercise of the right of eminent domain": *Cunningham v. International R. R. Co.*, 51 Tex. 518; 82 Am. Rep. 632. See *Pierce on Railroads*, 290.

As we have already seen, the case does not come within the



fifth exception, for there is no legal evidence that the railroad company had any control over the construction, as to the manner or means of doing the work. Nor does it come within the next exception, for the facts do not show any ratification of the wrongful acts of the contractor. It is not shown when the company accepted the road from the contractor. The evidence does show that the work near the plaintiff's house was done either in March, April, or May, and that about the 1st of June the plaintiff and his wife became sick. But under the contract the road was not to be turned over to the company until several months after this. The company not being in possession of the road at the time the plaintiff received the injury from the nuisance, and there being no evidence to show that it knew there was a nuisance, it cannot be said that the company ratified any act of its contractor which created a nuisance.

It only remains for us to say that we think the court should have excluded the whole answer to the interrogatory set out in the fourth ground of the motion for a new trial, and that the error was not cured by the agreement of defendant's counsel that the whole might be read, after the court had decided that only a part of it could be read. In his answer the witness assigned four causes which in his opinion produced the malaria: the embankment of loose earth, the horse lot and the hog lot, and the dam. This answer was objected to because there was no allegation in the petition that the horse lot and hog lot produced the malaria. The court therefore ruled that these two reasons should be stricken, and the remainder of the answer read. The effect of this ruling was to make the witness testify that the loose earth and the dam alone produced the malaria, when the answer showed that in his opinion it was produced by these and the horse and hog lot. We do not think the answer of the witness ought to have been cut up in this manner. By so doing he was made to testify what he did not intend to. The plaintiff should either have amended his declaration to meet the proof, or the whole answer should have been excluded. Nor do we think the defendant waived this error by consenting, after the above ruling, that the whole should be read. The ruling of the court striking out two of the causes of malaria, and leaving in two, placed the defendant in a worse position than that in which it would have been if the whole answer had remained.

The court should also have excluded the declarations of



English and Hammond as set out in the fifth and sixth grounds of the motion. They were not the servants or agents of the railroad company, and any declarations they may have made would not bind the company.

Judgment reversed.

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IN THE CASE of *Fulton County Street R. R. Co. v. McConnell*, 87 Ga. 756, it appeared that the company was authorized to build a street-railroad through certain streets of the city of Atlanta, and it entered into a contract with the Thompson-Houston Electric Company, by which the latter agreed to furnish all the material and to construct said road, without any direction or control reserved to the street-railroad company. During the construction of the road, said electric company laid the iron rails about eight feet apart on each side of the proposed road-bed, for a considerable distance beyond the place where the employees of the contractor were preparing the road-bed for the cross-ties and iron. The rails as thus laid furnished a continuous line on each side of the road-bed ahead of such employees, and were thus placed to expedite the work, and mark the lines to guide them in doing the work, although this was not necessary, as other means and lines to guide the men might have been employed, which would have been safe, and it would have been safer if such means had been employed, and the rails allowed to remain on the sides of the street or in the gutters until actually needed in laying the road. McConnell was riding on horseback upon a street where the rails were thus laid, and in attempting to cross, his horse struck a foot against one of the rails and fell, seriously injuring McConnell. He brought an action against the street-railroad company and the electric company jointly, and recovered judgment against both companies. They moved for a new trial, the motion was overruled, and they appealed. In disposing of the appeal, the court said: "The testimony shows that there were two ways to mark the lines to guide the hands, one safe and the other unsafe. Where a person or corporation is authorized by law to obstruct the public streets of a city for any purpose, it is incumbent on him or it to exercise great care to prevent passengers along the streets from being injured. And if, in the progress of the work, it becomes necessary to do a certain thing, and there are two ways of doing it, one safe and the other unsafe and unnecessary, if the unsafe method is adopted, and a person is injured thereby, it is such negligence on the part of the person or corporation performing the work as would authorize the party injured to recover damages. Although a person may have authority to obstruct the street for the purpose of constructing a railroad track therein, he has no right to obstruct more of that street than is necessary for the proper performance of his work at that time and place. He has no right to put obstructions far in advance of the work which is being performed, and which are unnecessary at that time to enable him to carry on his work. The people have a right to the use of the streets as well as the street-railroad companies or their contractors, and neither the companies nor their contractors have a right to prevent the free use of and access to the streets by the people, except at times and places where it is necessary for the companies or contractors to occupy them; and if they should place unnecessary obstructions in the street, and a passenger in the street should be injured thereby, they would be liable unless the injury could have been avoided by the exercise of due care on the part of the passenger. We therefore think the court did not err in overruling the motion for a new trial as to the Thompson-Hous-

ten Electric Company. The case of the Fulton County Street Railroad Company presents a different view. The evidence shows that it made a contract with the Thompson-Houston Electric Company to construct the road-bed of its line. The latter company was to furnish all the material, and was not to be subject to the direction or control of the former company. This made it an independent contractor, and not the servant or agent of the Fulton County Street Railroad Company. Our code, section 2962, declares: 'The employer is not responsible for torts committed by his employee when the latter exercises an independent business, and in it is not subject to the immediate direction and control of the employer.' To this general principle we held in the case of *Atlanta etc. R. R. Co. v. Kimberly*, 87 Ga. 161, *ante* p. 231, there are certain exceptions. The evidence does not show that this case falls within either or any of the exceptions stated in that case. The work in constructing the road was not wrongful in itself, the company having obtained authority from the legislature and the consent of the municipal authorities. Nor would the work result in a nuisance, for the same reason. Nor was it, according to previous knowledge and experience, in its nature dangerous to others if carefully performed. It was not a violation of a duty imposed by express contract upon the employer. Nor was the duty of constructing the road imposed by statute upon the company obtaining the charter. The company did not retain the right, in its contract, to direct and control the time and manner of executing the work. Nor did it ratify the wrongful act of the contractor. So, as before remarked, the evidence does not bring the street-railroad company within any of the exceptions to the general rule laid down in the *Kimberly* case. If the independent contractor is guilty of an act of negligence which causes injury to a third person, and the evidence shows that the act does not fall within any of these exceptions, the employer is not liable. This is the rule in regard to all employers and independent contractors. The rule announced in the code — which is simply declaratory of the common law — is a broad one, and applies to all independent contractors, regardless of whether the work is to be performed in a thoroughfare, where public rights are involved, or in a place where private rights only are affected. The courts would have no right to apply it in the one class of cases and refuse to apply it in the other. The legislature alone can do this if in its wisdom it sees proper. On the subject of employers and independent contractors, see *Atlanta etc. R. R. Co. v. Kimberly*, 87 Ga. 161; *ante*, p. 231, and authorities cited; also *Hackett v. Western U. Tel. Co.*, 80 Wis. 187. We think, therefore, that the court erred in not granting a new trial to the Fulton County Street Railroad Company. The judgment is affirmed as to the Thompson-Houston Electric Company, and reversed as to the Fulton County Street Railroad Company."

**MASTER AND SERVANT — LIABILITY FOR NEGLIGENCE OF INDEPENDENT CONTRACTOR.** — An employer is not liable to third persons for the negligence of a contractor in the performance of whose work he has no right of supervision or interference, and this rule applies as well to corporations as individuals: *Lancaster etc. Imp. Co. v. Rhoads*, 116 Pa. St. 377; 2 Am. St. Rep. 608, and note; *Harrison v. Collins*, 86 Pa. St. 153; 27 Am. Rep. 699, and note; *Hillard v. Richardson*, 3 Gray, 349; 63 Am. Dec. 743, and note; extended note to *Stone v. Cheshire R. R. Corp.*, 51 Am. Dec. 200-206.

**MASTER AND SERVANT — MASTER WHEN LIABLE FOR ACTS OF INDEPENDENT CONTRACTOR.** — If a proprietor undertakes to do on his land something dangerous in its nature to an adjacent owner, he will be liable for any negligent injury caused thereby, even though the work is done by an indepen-

dent contractor: *Dillon v. Hunt*, 105 Mo. 154; 24 Am. St. Rep. 374, and note. The employer is liable when the act contracted by him to be done by an independent contract is a nuisance in itself: *King v. New York etc. R. R. Co.*, 66 N. Y. 181; 23 Am. Rep. 37.

**MASTER AND SERVANT — RATIFICATION OF WORK OF INDEPENDENT CONTRACTOR.** — Owners assume responsibility for the sufficiency of a structure by acceptance and use of it, and the liability of the contractors then ceases: *Bonwell v. Laird*, 8 Cal. 469; 68 Am. Dec. 345, and note.

## ELLISON v. LUCAS.

[87 GEORGIA, 223.]

**PARTNERSHIP — SALE OF FIRM ASSETS TO PAY INDIVIDUAL DEBT, WHEN VALID AS AGAINST FIRM CREDITORS.** — The members of an insolvent partnership may unite in selling the firm assets in payment of their individual debts; and such sale, if made in good faith, for full value, and without fraud, is valid as against the partnership creditors, when an insolvent is given the right to prefer creditors.

**PARTNERSHIP — PAYMENT OF INDIVIDUAL DEBT WITH FIRM ASSETS — CONSIDERATION — PRESUMPTION.** — Where the members of a partnership assign the firm assets in good faith and for full value to a third person in satisfaction of their individual debts, and the assignment recites that the consideration is a given sum of money, it will be presumed that the consideration named is the actual value of the property conveyed.

**PARTNERSHIP — ASSIGNMENT OF FIRM ASSETS IN PAYMENT OF INDIVIDUAL DEBTS — EXCESS VOID AS TO FIRM CREDITORS.** — Where the members of a partnership unite in transferring the firm assets to a third person in payment of their individual debts, but the value of one of the partner's share in the firm assets considerably exceeds in amount his debt paid by the assignment, this amounts to a donation of the excess to his partner, and to that extent is void as to the partnership creditors.

**ACTION** by Ellison and Sons, creditors of the firm of Lucas and McDuffie to set aside an assignment made by the latter firm to one Cohen. The remaining facts are stated in the opinion. The lower court sustained the assignment, refused a new trial, and the plaintiffs appealed.

*Barrow and Thomas*, for the plaintiffs.

*T. W. Reed, T. W. Rucker, A. J. Cobb, and Lumpkin and Burnett*, for the defendants.

**LUMPKIN, J.** 1. It was held by this court in the case of *Veal v. Keely Co.*, 86 Ga. 130, that a mortgage given by a partnership on partnership property to secure a debt due by one of the partners was valid against creditors of the firm, and that this was especially true when the debt due by the individual

member had, by consent of the partners, been made a debt of the firm. This doctrine, irrespective of the qualification as to making the debt that of the firm, is supported by Jones on Chattel Mortgages, section 44, there cited. In Veal's case, the question as to how the solvency or insolvency of the partnership would affect the transaction was not made or considered. Our code, section 1953, gives every debtor the right to prefer one creditor to another, and to that end he may give liens or sell property in payment of the debt. No distinction is made as to the kind of creditors who may be preferred or as to the kind of property which may be used for this purpose. In this case it appears that the transfer of the partnership property to Cohen was signed by Lucas and McDuffie as a firm, and by each of the members individually. We think, under the section of the code cited, and under the law generally, each of these members had the right, with the consent of his partner, to sell his share in the firm assets in payment of his individual indebtedness. As stated in the section above cited from Jones on Chattel Mortgages: "The rule preferring partnership property for the payment of partnership debts is for the benefit of the partners, and they may waive it. . . . The partners, while the partnership property is still under their control, have power to appropriate it to secure their individual debts. The mere preference of individual debts . . . over partnership debts is not such a fraud upon partnership creditors that a court of equity will set it aside. The partnership creditors have no lien on the property of the partnership, if the partners themselves have none." See also Story on Partnership, section 358.

It must not be overlooked that under our own statute the right to prefer creditors is secured as well to insolvent as to solvent debtors, provided, of course, they exercise this right in good faith and without fraud on the rights of others. The doctrine is laid down in Bates on Partnership that it is not uncommon for a partnership to use the right of absolute disposition of its property by employing firm funds to pay the separate debt of a single partner; and it is said, in effect, that this right is unlimited except as controlled by statutes against voluntary conveyances in fraud of creditors and the similar provisions of the bankrupt law. Of course, where this right is exercised for fraudulent purposes, the transaction will be void: Bates on Partnership, secs. 565, 566. In *Marks v. Hill*, 15 Gratt. 400, it was held that "partnership effects may be ap-

plied, by the concurrence of the partners, to pay an individual debt of one of them, if the other receives a sufficient consideration therefor, though they may be unable to pay all their partnership debts." In *Woodmansie v. Holcomb*, 34 Kan. 35, it was held that while the partnership remains in existence, and in a solvent condition, it may, with the consent of all the partners, transfer firm property in payment of the individual debt of one of its members; and in the opinion, on page 38, Johnson, J., says: "The decisions of the courts have gone further than this, and although not unanimous, the weight of authority seems to be that mere insolvency, where no actual fraud intervenes, will not deprive the partners of their legal control over the property, and of the right to dispose of the same as they may choose; and where the separate creditor purchases from the firm in good faith, and the individual indebtedness is a fair price for the property purchased, such purchase cannot of itself be held fraudulent as against the general creditors of the firm." The following cases are there cited in support of this assertion: "*Sigler v. Knox County Bank*, 8 Ohio St. 511; *Schmidlapp v. Currie*, 55 Miss. 597; 30 Am. Rep. 530; *Case v. Beauregard*, 99 U. S. 119; *National Bank of the Metropolis v. Sprague*, 20 N. J. Eq. 13; *Wilcox v. Kellogg*, 11 Ohio, 394; *Gwin v. Selby*, 5 Ohio St. 96; *Allen v. Center Valley Co.*, 21 Conn. 130; 54 Am. Dec. 333; *Rice v. Barnard*, 20 Vt. 479; 50 Am. Dec. 54; *Haben v. Harshaw*, 49 Wis. 379; *White v. Parish*, 20 Tex. 688; 73 Am. Dec. 204; *Schaeffer v. Fithian*, 17 Ind. 463; *McDonald v. Beach*, 2 Blackf. 55; *Ex parte Ruffin*, 6 Ves. 119; *Whitton v. Smith*, 1 Freem. Ch. 231; *Freeman v. Stewart*, 41 Miss. 138; *Potts v. Blackwell*, 4 Jones Eq. 58." See also the notes to the case of *Schmidlapp v. Currie*, 30 Am. Rep. 533, in which reference to many cases bearing on this subject will be found, and among them that of *Sigler v. Knox Co. Bank*, 8 Ohio St. 511, above cited, in which it was held that where a creditor of a firm and one of its members, with the assent of all the partners, bought of the firm in good faith, and at a fair price, goods to the amount of such joint and separate indebtedness, though with knowledge that the firm was insolvent in the proper sense of the term, such purchase was not fraudulent as against other creditors of the partnership. As will be seen above, in the quotation from the opinion of Johnson, J., in the case cited from 34 Kansas, he remarks that the decisions are not unanimous in holding "that mere insolvency, where no actual fraud intervenes, will not deprive the partners of

their legal control over the property," etc. Accordingly, we have found, in support of the contrary doctrine, the following cases: *Wilson v. Robertson*, 21 N. Y. 591; *Menagh v. Whitwell*, 52 N. Y. 146; 11 Am. Rep. 683; *Clements v. Jessup*, 36 N. J. Eq. 572; *Arnold v. Hagerman*, 45 N. J. Eq. 186; 14 Am. St. Rep. 712; and *Phelps v. McNeely*, 66 Mo. 554; 27 Am. Rep. 378; See also *Davies v. Atkinson*, 124 Ill. 474; 7 Am. St. Rep. 373; and Story's Eq. Jur., sec. 1253. Nevertheless we are of the opinion that the true law of the case is as stated in the language taken from page 38 of 34 Kansas, and that the current of authority is in that direction. Indeed, this doctrine was recognized by the learned counsel who argued this case for the plaintiff in error, who conceded that if the value of Lucas's share in the partnership assets was not materially greater than the amount of his individual indebtedness to Cohen, the transaction would be legal and valid. He rested his case upon the law that a voluntary deed or conveyance by an insolvent debtor is void as to his creditors, and contended that under the agreed statement of facts, it appeared that Lucas's half of the partnership assets, which he transferred to Cohen, was actually worth about five hundred dollars more than the amount Lucas owed Cohen, and consequently, that Lucas had donated to his partner, McDuffie, without any valuable consideration therefor, about five hundred dollars' worth of the property. We will now consider whether this position has merit in it.

2. The assignment of Lucas and McDuffie to Cohen recites that it is made for and in consideration of the sum of \$4,331 $\frac{3}{4}$ , and in the agreed statement of facts it appears that full value was paid by Cohen for the property. Lucas's debt to Cohen was \$1,600, and some interest thereon. McDuffie's debt to Mrs. Reese, assumed by Cohen, was \$2,625, and interest. These sums added together make the consideration expressed in the assignment. The facts stated amount to *prima facie* proof that this consideration was the actual value of the property sold to Cohen. From no other source in the record is any light thrown upon this question, except the statement that all these parties acted in perfect honesty and without fraud. These things being true, the presumption arises that the goods were bought at a fair price. To assume otherwise, in the light of the facts, would be mere conjecture. Moreover, if Cohen actually paid more for the goods than they were worth, it is quite certain he would have taken pains to

make this exceedingly important fact appear. Taking the case, therefore, as it stands, it seems that Lucas parted with his half of the firm assets for a consideration materially less than its actual value; and to the extent of the difference between such value and the amount of the debt he owed Cohen, this action on his part amounted in law to a donation of so much of his property to his partner, McDuffie, and was void as to creditors.

The entire record of the case was not sent up, and we are therefore unable to ascertain what the pleadings contain; but for the reasons stated above, we think the verdict was wrong, and that the court erred in refusing a new trial.

Judgment reversed.

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**PARTNERSHIP—SALE OF FIRM ASSETS TO PAY INDIVIDUAL DEBT.** — As against a general creditor of a solvent partnership, one of the firm may, with the consent of his copartners, make an absolute transfer of the entire firm assets to pay his debts: *Schmidlapp v. Currie*, 55 Miss. 597; 30 Am. Rep. 530, and note; note to *Arnold v. Hagerman*, 14 Am. St. Rep. 725; *Davies v. Atkinson*, 124 Ill. 474; 7 Am. St. Rep. 373, and extended note; note to *Cannon v. Lindsey*, 7 Am. St. Rep. 41. One partner cannot, without the consent of the others, use the funds of the partnership to pay his individual debts: *Furnell v. St. Paul Trust Co.*, 45 Minn. 495; 22 Am. St. Rep. 742, and note; *Hinds v. Backus*, 45 Minn. 170.

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## O'CONNELL v. EAST TENNESSEE, VIRGINIA, AND GEORGIA RAILWAY COMPANY.

[87 GEORGIA, 246.]

### **WATERCOURSES—LAND-OWNERS LIABILITY FOR DIVERTING OVERFLOW.** —

A land-owner on the bank of a river who erects on his own land an embankment which increases the overflow in times of flood upon the lands of the opposite proprietor, to the injury of the latter, is liable in damages therefor.

### **WATERCOURSES—OVERFLOW NOT SURFACE WATER—LIABILITY FOR OBSTRUCTING OVERFLOW BY RAILROAD EMBANKMENT.** —

The surplus waters of a river or watercourse in time of flood do not cease to be part of the watercourse and become surface water when they naturally spread over the adjacent lowlands without well-defined banks or channels, so long as they eventually return to and are discharged through the channel of such watercourse; and a railroad company is liable in damages for obstructing such waters by an embankment on its own land, thus throwing excessive waters upon the land of an adjacent or opposite owner, to his injury.

**ACTION** to recover damages for excessive overflow of lands, alleged to have been caused by an embankment erected by the



defendant railroad company. Said railroad company erected such embankment for its track along the margin and on the lower side of a river, thereby causing its accumulated waters, in times of flood, which had previously escaped on that side, to overflow the land on the opposite side of the river to a greater extent than it had done before, thus causing a greater injury. The plaintiff was a land-owner on the side of the river opposite to the railroad embankment. A demurrer to his declaration was sustained, and he appealed.

*Gustin Guerry and Hall*, for the plaintiff.

*Bacon and Rutherford*, for the defendant.

LUMPKIN, J. The precise question in this case is, whether the owner of land on the bank of a river can, without liability, erect on his own land an embankment which increases the overflow in times of flood upon the lands of the opposite proprietor, to the injury thereof; or is there any duty for each owner to receive upon his land the share allotted it by nature of the flood waters of the river. It is contended by defendant's counsel that the overflow from a river in time of flood or freshet is surface water, against which, by the common law, a man may protect himself without regard to the consequences to his neighbor. Many cases cited by him make a distinction between the common law and the civil law as to surface water, the former allowing the land-owner to dispose of it in any way, the latter restraining him from so using it as to injure his neighbor's tenement. There is authority to show that there is no difference between the common and the civil law in this respect, but that the common follows the civil law: *Gillham v. Madison Co. R. R. Co.*, 49 Ill. 484; 95 Am. Dec. 627; *Gormley v. Sanford*, 52 Ill. 158; and the able opinion in *Boyd v. Conklin*, 54 Mich. 583; 52 Am. Rep. 831. There is much conflict in the American cases (Washburn on Easements, 485, \*353, et seq.), the majority of the states seeming to follow the so-called civil-law rule. Thus it is material to consider whether the overflow as above stated is properly classed with surface water. This depends upon the configuration of the country and the relative position of the water after it has gone beyond the usual channel. If the flood water becomes severed from the main current, or leaves the stream never to return, and spreads out over the lower ground, it has become surface water. But if it forms a continuous

body with the water flowing in the ordinary channel, or if it departs from such channel *animo revertendi*, presently to return, as by the recession of the waters, it is to be regarded at still a part of the river. The identity of a river does not depend upon the volume of water which may happen to flow down its course at any particular season. The authorities hold that a stream may be wholly dry at times without losing the character of a watercourse. So, on the other hand, it may have a "flood-channel" to retain the surplus waters until they can be discharged by the natural flow. The low places on a river act as natural safety-valves in times of freshet, and the defendant claims the right to stop up one of these without liability for ensuing damage.

The English cases on the question are not numerous, though from the decisions and *dicta* of the judges, the law appears to be well understood and settled. In *Rex v. Pagham Commissioners*, 8 Barn. & C. 355, it was held that an owner of land on the seashore could erect works to protect his land from encroachments by the sea, without liability for damage inflicted on his neighbor. The sea was called a "common enemy," against which each might fortify at will. It appeared in *Rex v. Trafford*, 1 Barn. & Adol. 874, that a canal had been built by authority of Parliament, and carried across a river and the adjoining valley by means of an aqueduct and an embankment containing several arches. A brook fell into the river above its point of intersection with the canal. In times of flood, the water, which was then penned back into the brook, overflowed its banks, and was carried, by the natural level of the country, through the arches into the river, doing much mischief to the lands over which it passed. The aqueduct was sufficiently wide for the passage of the river at all times but those of high flood. The occupiers of the injured lands adjoining the river and brook, for the protection thereof, erected banks (called "fenders") so as to prevent the flood water from escaping; consequently, the water, in time of flood, came down in so large a body against the aqueduct and canal as to endanger them and obstruct the navigation. The fenders were not unnecessarily high, and without them many hundred acres of land would be exposed to inundation. It was held that the defendants were not justified, under these circumstances, in altering for their own benefit the course in which the flood water had been accustomed to run; that there was no difference in this respect between

flood water and an ordinary stream; that an action would have lain at the suit of an individual, and consequently that an indictment lay where the act affected the public. The conviction was accordingly sustained. The doctrine of *Rex v. Pagham Commissioners*, 8 Barn. & C. 355, was sought to be extended to this case, but Tenterden, C. J., who had rendered the decision in that case, said: "It has long been established that the ordinary course of water cannot be lawfully changed or obstructed for the benefit of one class of persons, to the injury of another. Unless, therefore, a sound distinction can be made between the ordinary course of water flowing in a bounded channel at all usual seasons, and the extraordinary course which its superabundant quantity has been accustomed to take at particular seasons, the creation and continuance of these fenders cannot be justified. No case was cited, or has been found, that will support such a distinction. The Pagham case . . . . is of a very different kind. . . . In the one case, the water is prevented from coming where, within time of memory at least, it never had come; in the other, it is prevented from passing in the way in which, when the occasion happened, it had been always accustomed to pass." This seems to be an authoritative enunciation of the common law. *Menzies v. Breadalbane*, 3 Bligh, 414, is directly in point, but was determined by the law of Scotland. Yet the lord chancellor said: "It is clear, beyond the possibility of a doubt, that by the law of England, such an operation could not be carried on. The old course of the flood stream being along certain lands, it is not competent for the proprietors of those lands to obstruct that old course, by a sort of new water-way, to the prejudice of the proprietor on the other side." In *Attorney-General v. Earl of Lonsdale*, L. R. 7 Eq. 387, 20 L. T. 64, it was attempted to extend the sea doctrine to the case of a tidal river, but Vice-Chancellor Malins refused to so extend it, on the authority of *Menzies v. Breadalbane*, 3 Bligh, 414, saying that Lord Eldon put that case upon the general law of England. In *Mason v. Shrewsbury etc. R. R. Co.*, L. R. 6 Q. B. 581, we find a *dictum* by Blackburn, J., as follows: "Before the canal was made, the person whose estate the plaintiff now has had the ordinary rights and liabilities of a riparian owner on the banks of a natural stream. He was entitled to have the water flow to him in its natural state, so far as that was a benefit, as, for instance, to turn his mill or water his cattle; and he was bound to submit to receive the

water, so far as it was a nuisance, as by its tendency to flood his lands." *Lawrence v. Great Northern R'y Co.*, 4 Eng. L. & Eq. 265, 16 Com. B. 643, is considerably in point. A railway was constructed across certain lowlands adjoining a river, over which the flood waters used to spread themselves. These lowlands were separated from the plaintiff's lands by a bank, constructed under certain drainage acts, which protected the plaintiff's lands from floods. By the construction of the railway, the flood waters could not spread themselves as formerly, but were penned up, and flowed over the bank upon the plaintiff's lands. It was held that an action would lie against the company for the injury. Patterson, J., said: "*Prima facie* this would give the plaintiff a cause of action, and the question is, whether the company are protected by their act," a question which cannot arise in our law.

In connection with the cases of *Rex v. Trafford*, 1 Barn. & Adol. 874, and *Lawrence v. Great Northern R'y Co.*, 4 Eng. L. & Eq. 265, 16 Com. B. 643, it must be borne in mind that the first obstruction of the flood waters there mentioned is, in England, justified by the statute authorizing it, and therefore stands on much the same footing as a natural obstruction; but the liability of the other party, who erected the second obstruction without statute authority, springs from the common law. No English authority has been found to controvert these principles; but the text-writers recognize them as settled law: Woolrych on Waters, 213; 78 Law Lib. 212; Crabb on Real Property, sec. 420; 54 Law Lib. 263; Michael and Will on Gas and Water, 213, 214, 666, London ed. 1884; Angell on Watercourses, secs. 333, 334; Gould on Waters, secs. 160, 209.

In grouping the American cases, those tending to sustain the contention of defendant in error will first be stated. *Taylor v. Fickas*, 64 Ind. 167, 31 Am. Rep. 114, was much relied upon. There the injury was caused by the obstruction of the passage of drift-wood, both owners being on the same side of the river, and the lower owner having planted a row of trees along the dividing line. The opinion, it is true, treats overflow in flood times as surface water; but it will be noticed that nothing is said or decided about changing the course of the water. The facts are obviously different from those in the present case. In *Cairo etc. R. R. Co. v. Stevens*, 73 Ind. 278, 38 Am. Rep. 139, the plaintiff's land was between the river and the railroad embankment. The overflow is treated as surface water,

and the road held not liable. But it would seem that the water doing the damage had left the river never to return. *Shelbyville etc. Turnpike Co. v. Green*, 99 Ind. 205, follows the last case. The turnpike was flooded because of an embankment erected by Green to protect his land from overflow, both parties being on the same side. It was held that the company could not recover. But note that the court adverts to the fact that the company did not own the soil over which the pike ran, but merely had an easement therein. *McCormick v. Kansas etc. R. R. Co.*, 57 Mo. 433, can also be distinguished. Here the overflowing water left the stream permanently, and entered a pond formed thereby and by other surface water, the draining of which pond caused the injury sued for. In *Shane v. Kansas etc. R. R. Co.*, 71 Mo. 237, 36 Am. Rep. 480, the overflow is apparently treated as surface water, although it had a way, through a slough, back into the stream. But the court applied the civil law, and held the railroad liable. This case, together with that of *McCormick v. Kansas etc. R. R. Co.*, 70 Mo. 359, 35 Am. Rep. 431, is overruled, in so far as the civil law was followed, by *Abbott v. Kansas etc. R. R. Co.*, 83 Mo. 271, 53 Am. Rep. 581, and the common law as to surface water returned to. In this last case it is said that the court in the Shane case treated the overflow as part of the stream, and therefore that the decision was correct on common-law principles. In the Abbott case the court expressly assumes the waters to be surface waters; it seems they escaped from the bed of the creek, and flowed over the lands without any return.

*Lamb v. Reclamation Dist.*, 73 Cal. 125, 2 Am. St. Rep. 775, is not much in point. The defendant was a public corporation for the purpose of reclaiming the lowlands protected by the embankment which closed up a slough through which an inconsiderable part of the flood waters escaped into a natural basin. The plaintiff's land lay two miles below on the opposite side. The court applied the sea doctrine of the common law, and held the company not liable. But the decision is mainly rested on another ground, namely, that the corporation was not liable as for exercising the right of eminent domain. And in view also of the concurring opinions, the case is weak on the question involved in the case at bar. See below for an earlier decision by the same court looking another way, not noticed in the case above. In *Hoard v. Des Moines*, 62 Iowa, 326, the plaintiff's land was between the river and the em-

bankment, and it was held that the plaintiff had no right to have the flood waters from the river pass over his land onto that of another, although they finally joined the river again at a point farther down.

At first view, *Moyer v. New York Cent. etc. R. R. Co.*, 88 N. Y. 351, seems to support the defendant's position. But a close examination shows otherwise. The complaint averred that the damage was caused by the railroad building an embankment on the opposite side of the river. Evidence was offered and objected to, to show damage caused by raising the tracks; it was admitted, the railroad excepting. The referee included in his finding for the plaintiff the damages caused by raising the tracks, as to which the complaint alleged nothing, thus tainting the whole finding with illegality. The judgment was reversed for the error in admitting said evidence, and in said finding. The court say, the defendant, as a matter of law, would not be liable for consequential damages caused by the raising of the embankment on the company's own land in a proper and workmanlike manner, citing *Bellinger v. New York Central R. R. Co.*, 23 N. Y. 47. This case bases the freedom from liability upon the legislative authority, but concedes that a private individual would be liable under the same conditions. In our law, the railroad occupies no better position in this respect than the private individual.

Now will be stated the American cases going to show that the defendant is liable, if it has erected the obstruction to the flood waters of the river as complained of in this case. The surplus waters do not seem to be part of the river when they spread over the adjacent low grounds, without well-defined banks or channel, so long as they form with it one body of water eventually to be discharged through the channel proper. Thus it is held, where the waters of a stream disperse themselves over low ground, without any well-marked course, but gather up lower down into a defined channel, they are not surface water while in the dispersed state, and interference with them then gives the injured party a right of action: *Macomber v. Godfrey*, 108 Mass. 219; 11 Am. Rep. 349; *Gillett v. Johnson*, 30 Conn. 180; *Briscoe v. Drought*, 11 Ir. C. L. 250; *West v. Taylor*, 16 Or. 165. But if it were conceded that the overflow is surface water, it would certainly cease to be such when turned back into the stream by the defendant's obstruction: *Sullens v. Chicago etc. R'y Co.*, 74 Iowa, 659; 7 Am. St. Rep.



501; *Moore v. Chicago etc. R'y Co.*, 75 Iowa, 263; *Jones v. Han-novan*, 55 Mo. 462; *Mississippi etc. R. R. Co. v. Archibald*, 67 Miss. 38. Under these authorities, this declaration might be sustained as complaining that the defendant prevented the flood waters from becoming surface waters, and threw them back across the river upon plaintiff's land: See further, as to surface water, 17 Cent. L. J. 42, 62; Angell on Water-courses, secs. 108 a et seq.; Gould on Waters, secs. 263 et seq. But it is not necessary to take this view, as the following authorities show the defendant to be liable under the alleged facts:—

Where the effect of the defendant's dike was to retain on the land of the plaintiff flood waters from the river longer than they would otherwise remain, the injury was held actionable, and the demurrer overruled: *Montgomery v. Locks*, 11 Pac. Rep. 874 (Cal. Aug. 30, 1886). Where, in a freshet, the stream broke over one of its banks, carrying a part of it away, it was held that the owner might replace the bank with a dam, provided he did not build higher than the original bank, or otherwise cause the water to flow differently from the natural flow: *Pierce v. Kinney*, 59 Barb. 56. "It is well settled that every person through whose land a stream of water flows may construct embankments and other guards on the bank to prevent the stream washing the bank away and overflowing and injuring his land. But in doing this, he must be careful so to construct them as not to throw the water upon his neighbor's lands where it would not otherwise go in ordinary floods. If he does, he will be liable for the injury": *Wallace v. Drew*, 59 Barb. 413. There is no distinction in principle or authority between obstructing the flow of a stream at its ordinary level and in time of flood: *Burwell v. Hobson*, 12 Gratt. 322; 65 Am. Dec. 247. This case is in point, and holds the defendant liable. Another case in point is *Crawford v. Rambo*, 44 Ohio St. 279, holding that flood water is not surface water, and that interference therewith gives a right of action. So *Byrne v. Minneapolis etc. R'y Co.*, 38 Minn. 212, 8 Am. St. Rep. 668, holds that overflow in times of high water is not surface water, and the railroad is liable for obstruction of such water by an embankment erected on its own land. See also *Rau v. Minnesota Val. R. R. Co.*, 13 Minn. 442, where the railroad made an extensive excavation on its own land, into which overflow waters from the Mississippi River entered, to the damage of an adjoining owner. The railroad was liable. *Gerrish v.*



*Olough*, 48 N. H. 9, 97 Am. Dec. 561, 2 Am. Rep. 165, and notes, and *Tuthill v. Scott*, 43 Vt. 525, 5 Am. Rep. 301, seem not to involve the question as to the action of the water in times of flood, but are adverse to defendant as far as they go. In *Carriger v. East Tenn. etc. R. R. Co.*, 7 Lea, 388, the railroad embankment did not affect the usual flow of the streams, but obstructed the flood channel, and threw the excessive waters upon the plaintiff's lands. This same defendant contended that they were surface waters, which it had a right to obstruct. The trial court gave judgment for the defendant, holding "that the overflow in question resulted from accumulations of surface water caused by extraordinary rains, and that the law relating to surface water, and not that of running streams, governs the case." The supreme court said: "The question to be determined is, Is this such surface water as to relieve the defendant? . . . . The springs and their branches are never-failing, and flow off in a northward direction toward the farm of plaintiff. In ordinary times, they find outlets through the caverns or sinks in the earth; in extraordinary times, their volumes are too great for the usual place of discharge. These springs and branches are sometimes large, and sometimes small; still they are the same springs and branches, requiring, as all running streams do, sometimes less and at other times more surface for their escape. . . . . If the embankment had been erected in a valley near a low bank of the river, which overflowed at high tide, but escaped in one passage, so as not to materially injure adjoining lands, but if obstructed by the embankment, would overflow and damage, as in this case, we think it would not be insisted that it was not obligatory on the defendant to build a culvert to prevent damage that must certainly come with the high tide. Is there a difference in reason as to the case put and the one at bar? We think not. While they may not be so frequent, the overflows from the branches are as certain as those from the river; one is as certainly a constant running stream as the other. . . . . It is no defense for it to say that it was only in extraordinary times the injuries now complained of could result. The rises in the waters had for all time occurred at intervals before the building of the road, and it was to be conclusively presumed that they would occur afterwards from similar causes." The court entered judgment for the plaintiff. This is a stronger case than the one now to be decided. Counsel for defendant ably and strenuously insist that the common,

and not the civil, law be applied to this case. The above authorities prove that the common law does not regard the waters here complained of as mere surface water, but as a part of the river. The civil law might be more favorable to the defendant's case; for it seems to regard the flood waters of a river as a common enemy, against which each riparian owner may build defenses with impunity: *Mailhot v. Pugh*, 30 La. Ann. 1359, citing authorities.

The defendant also claims that the question is settled by an act of the legislature, and cites section 2232 of the code. That section says: "All persons owning, or who may hereafter own, lands on any watercourses in this state are authorized and empowered to ditch and embank their lands, so as to protect the same from freshets and overflows in said watercourses; provided always, that the said ditching and embanking does not divert said watercourse from its ordinary channel, but nothing shall be so construed as to prevent the owners of land from diverting unnavigable watercourses through their own lands." This contention may be answered in three ways: 1. The declaration in this case distinctly alleges that the defendant did divert the river from its ordinary channel, for which act the statute affords no shadow of protection. 2. The allegations of the declaration do not show that defendant embanked its land "so as to protect the same," but constructed an embankment on which to lay its track, without regard to any consequences of benefit or injury to the contiguous country. 3. The construction long ago and repeatedly put by this court on the last part of the section, which says "nothing shall be so construed as to prevent the owners of land from diverting unnavigable watercourses through their own lands," necessitates the conclusion that this whole statute is not alterative, but only declaratory of the common law. In other words, the legislature did not intend to give riparian owners the privilege of ditching or embanking their lands, or of diverting unnavigable watercourses, so as to injure neighboring proprietors, without liability therefor. Indeed, the power of the legislature so to alter the common law is expressly denied in *Persons v. Hill*, 33 Ga. Supp. 143. And in *Cheeres v. Danielly*, 80 Ga. 118, the same view is taken as to the intention of the legislature in passing this act. It is true, these cases deal with the diversion of an unnavigable stream, but it would be absurd to impute to the legislature two conflicting intentions in the same act. And the ground taken in *Persons v. Hill*, 33 Ga. Supp. 143, will

equally well support the same rule of construction as to the other branch of the statute. The facts in *Persons v. Hill*, 33 Ga. Supp. 143, require notice. The owners were on the same side of the Flint River, into which Beaver Creek emptied after passing through the defendant's land. By mutual agreement between the upper owner (plaintiff) and the lower owner (defendant), the expense being also shared, an embankment was erected along the river to keep back the flood-waters which, from the facts of the case, seemed to have this course, that is to say, coming out on plaintiff's land, they flowed across the same and over defendant's land into the creek by which they would empty back into the river. The embankment not being kept up according to the agreement, defendant proposed to protect himself by diverting the creek through a canal on his own land to the river and building an embankment along his side of the canal. This canal would make an opening through the high bank of the river, and with the embankment, would allow and cause the high waters to back up on plaintiff's land. This court granted an injunction against the construction of the canal, but allowed the defendant to continue the embankment. One great difference from the present case might be found in the agreement for consideration to have the common protection of the first embankment: See *Savannah etc. R'y v. Lawton*, 75 Ga. 192. But at any rate, the decision does not contemplate that defendant's individual embankment would injure the plaintiff's land, such an inference being inconsistent with the plain language of the opinion on page 147.

There is another section of the code, not cited or discussed in the argument, which deserves mention in this connection: "No person shall be permitted to make or keep up any dam to stop the natural course of any water, so as to overflow the lands of any other person, without his consent, nor shall any person stop or prevent any water from running off of any person's field, whereby such person may be prevented from planting in season, or receive any other injury thereby, nor so as to turn the natural course of any water from one channel or swamp to another, to the prejudice of any person": Code, sec. 1607. This statute was passed September 29, 1773, and apparently revived by the act of February 25, 1784 (*Marbury and Crawford's Digest*, 404), being recognized by subsequent amendments, and by the codes: Acts 1855-56, p. 12; Acts 1865-66, p. 27. It is put in the code under the head "Culti-

vation of Rice," but from reading the original act (Marbury and Crawford's Digest, 178), it is by no means clear that it was intended to apply only on rice farms. Neither the title nor the body of the act contains the slightest intimation to that effect. Its terms are as broad and general as they well could be. The preamble, it is true, in stating the mischiefs to be remedied, describes such as probably were common in the localities where rice was cultivated, though even here there is no distinct allusion to rice culture. These mischiefs may, as a matter of history, having occasioned the enactment of the statute. But might not the legislature have deemed it wise to pass a general law, applicable in all portions of the state where similar mischiefs were likely to happen? It is not inconsistent with the purpose of an act for curing a special class of mischiefs to provide therein a remedy at the same time for all mischiefs of that genus. On the contrary, that would be a highly proper mode of legislation. If the preamble is not to be given a controlling and restrictive effect, this act alone would completely and effectually dispose of the present case, as the declaration alleges acts by the defendant which violate the law in question if it was intended to have a general application. But since it is unnecessary for the purposes of this case to measure the extent of this statute, the question is not decided, especially as it deserves more argument and consideration.

It was urged in the argument that the law ought to encourage the reclaiming and improvement of lands which are subject to injury from the natural action of floods and surface water; and it is surprising to find this argument unquestionably relied upon in many cases which are supposed to follow the common law of surface water. The error therein is easily exposed; for to the same extent as the land of an adjoining owner is damaged by the improvement on the defendant's land, so far exactly is the development of the damaged land set back and retarded. The defendant might bring his land to perfection for his uses, and then have all that good work ruined by the first measures of improvement adopted by his less progressive neighbor. The rule contended for by the defendant would be a poor encouragement to painstaking labor engaged in reclaiming unprofitable land. Every one is charged with notice of nature's operations, but who can tell when a man will build his bulwarks against the flood? There is no public policy to allow one land-owner to improve his condition at the

cost of his neighbor; but the improver must, at his peril, see to it that the benefit to himself is large enough to pay both him and his neighbor's damage, if any. The law does not look to the interest of one individual, but recognizes and enforces the duties implied in his relation to others. Of course, for these principles to apply, there must be, as in this case, an invasion of some tangible right: *Peel v. City of Atlanta*, 85 Ga. 138. And it must not be understood that this discussion rules anything beyond the questions contained in this particular case. Undoubtedly there is a class of rare cases not within the general rule, as indicated by the eloquent language of Agnew, J., in *Pittsburg etc. R'y Co. v. Gilleland*, 56 Pa. St. 452, 94 Am. Dec. 97, where he says: "There is therefore no liability for extraordinary floods, those unexpected visitations whose comings are not foreshadowed by the usual course of nature, and must be laid to the account of Providence, whose dealings, though they may afflict, wrong no one." But such is not the case made by this declaration.

For the foregoing reasons, it is evident that the court erred in sustaining the demurrer to the declaration.

Judgment reversed.

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**WATERCOURSES — LIABILITY OF LAND-OWNER FOR TURNING WATER ON LAND OF ADJACENT PROPRIETOR.** — A riparian owner has no right, by means of a dam, to collect water and discharge it upon the land of an adjacent owner, to his injury: *McKee v. Delaware etc. Canal Co.*, 125 N. Y. 353; 21 Am. St. Rep. 740. If, during freshets, large quantities of water are collected and forced into a well-defined channel, a railroad company maintaining an embankment there must provide a suitable culvert for its outlet: *Rowe v. St. Paul etc. R'y Co.*, 41 Minn. 384; 16 Am. St. Rep. 706, and note. Every man has a right to protect his land, but in doing so he must not injure his neighbor; so if one diverts a watercourse so as to injure his neighbor, he will be liable therefor: *Cheever v. Daniels*, 80 Ga. 115; *Mississippi etc. R. R. Co. v. Archibald*, 67 Miss. 38; *Sullens v. Chicago etc. R'y Co.*, 74 Iowa, 659; 7 Am. St. Rep. 501, and note.

**WATERCOURSES — SURFACE WATERS — WHAT CONSTITUTE.** — Water which overflowed from the main stream some distance above an embankment ceases to be surface water when turned back into the stream by such embankment: *Sullens v. Chicago etc. R'y Co.*, 74 Iowa, 659; 7 Am. St. Rep. 501; note to *Byrne v. Minneapolis etc. R'y Co.*, 8 Am. St. Rep. 671.

## GRAY v. WESTERN UNION TELEGRAPH COMPANY.

[87 GEORGIA, 330.]

**TELEGRAPH COMPANIES — DUTY TO ACCEPT AND TRANSMIT ALL LAWFUL MESSAGES.** — Any dispatch which a telegraph company can lawfully transmit by its own choice it must transmit and deliver, and it cannot reject any dispatch on account of its subject-matter, unless by sending it the company would or might subject itself or its servants either to indictment or civil action.

**TELEGRAPH COMPANIES — LIABILITY FOR DELAY IN DELIVERY OF MESSAGE RELATING TO "FUTURES."** — A telegraph company cannot escape its liability for negligent delay in delivering a message received for transmission and paid for, on the ground that it relates to a sale of "futures," unless it is made a crime or tort to speculate in "futures," or would subject the company to indictment or civil action to receive and transmit a message in relation thereto.

**TELEGRAPH COMPANIES — DUTY TO TRANSMIT AND DELIVER MESSAGES RELATING TO "FUTURES."** — It is not illegal for telegraph companies to receive and transmit messages relating to speculative transactions in "futures," when that class of business has not been made penal by statute; and when messages of that nature are offered and paid for, they must accept, transmit, and promptly deliver them, although the damages for failure to correctly transmit and promptly deliver them cannot be measured by the result of such speculative dealings.

*Hardeman, Davis, and Turner, and W. C. Winslow, for the plaintiff.*

*Gustin, Guerry, and Hall, for the defendant.*

BLECKLEY, C. J. That the United States mail might lawfully carry either a sealed letter or an open circular from Fort Valley to Macon, though the contents of the document related to the purchase and sale of futures, is certain. Equally certain is it that a common carrier between these points might innocently transport a passenger whose known business was to make a trip for the exclusive purpose of buying or selling futures, or might carry and deliver a bundle of stationery intended by the consignee for use in his business as a dealer in futures. In each of these cases, the object sought to be subserved by the writer, the passenger, or the consignee would simply be irrelevant. To consider it would be to introduce moral distinctions not pertinent to the function which the mail or the carrier was designed to perform. In like manner, under the statute on which the present action is founded, the moral purpose of a telegram is immaterial, provided it is not designed to prompt or promote the commission of a crime or a tort. Telegraph companies, like common carriers, are voluntary servants of the general public. They exercise a public

employment, and offer themselves for the transaction of business in behalf of every person who seeks to engage their skill and their special facilities for a peculiar class of work. Their relation to the public imposes upon them the duty of undertaking as well as the duty of performing, and the violation of either duty is a misfeasance, a tort. It is the equivalent, therefore, of an affirmative interference by a mere private person to hinder or obstruct communication. For one of these companies not to receive or not to transmit and deliver a dispatch when it ought to do so is more than a refusal to contract or than the breach of a contract; it is a wrong as pronounced as would be that of a person who should forcibly exclude another from the telegraph office, and prevent him from handing in a dispatch which he desired to lodge for transmission. In dealing with the wrong as such, the element of contract is not involved. Why should this company not have transmitted and delivered the reply which the plaintiff sent to his correspondent in answer to a dispatch from the latter which the company had brought to him by telegraph? The dispatch was, "Shall I draw for more bonus? Answer quick." The reply was, "If necessary, draw for more bonus." It is admitted that the subject of this correspondence was a transaction in futures, a species of gambling of the worst description, and it is on this ground that the failure of the company is sought to be justified. But the statute which we are considering makes by its letter no exception; it declares that every company of this description "shall, during the usual office hours, receive dispatches, whether from other telegraphic lines or from individuals, and on payment or tender of the usual charge, according to the regulations of such company, shall transmit and deliver the same with impartiality and good faith, and with due diligence, under penalty of one hundred dollars," etc.: Acts 1887, p. 111. In construing and administering the statute, what exceptions can the courts make by implication? Doubtless, a dispatch to be entitled to transmission must be free from open indecency or profanity, and perhaps other vices of language might condemn it; but supposing it to be proper in tone and expression, we should say that the company would have no concern with its import unless it sought to subserve either crime or tort. If it disclosed either of these objects, it seems to us that the company, for its own protection, might and should refuse to handle it. It would be unreasonable to suppose that the legislature intended telegraph companies to aid in the perpetration of



crimes or actionable wrongs, for this would be to constrain them to do by legislative mandate what they would have no right to do by their own choice. But, on the other hand, any dispatch which a company could lawfully transmit by its own choice the statute obliges it to transmit and deliver. The power of voluntary selection is denied, for every company is required to transmit and deliver "with impartiality and good faith." A dispatch cannot be rejected on account of its subject-matter, unless, by sending it, the company would or might subject itself or its servants either to indictment or a civil action. This is a rational test, and one that may fairly be presumed to coincide with legislative intention. If, before the statute was enacted, a telegraph company could, at its own will, serve one customer and decline to serve another, the dispatches of the two being exactly similar, this option no longer exists. All customers are now to be treated alike. If one can correspond by telegraph touching his speculations in futures, all may do so. There can be no discrimination, no favoritism. The company cannot waive morality for one, and stand on it against another. Now, in this state it is neither a crime nor a tort to speculate in futures. It is gross immorality, and conflicts with public policy, but it is not indictable nor actionable. On the contrary, by a recent statute, dealers are recognized and tolerated on condition of registering themselves and paying a fixed tax: Acts 1888, p. 22. It was certainly the legal right of the company to transmit and deliver the dispatch sent by the plaintiff if it had elected to do so. It would have incurred no penalty, subjected itself to no action or indictment. Moreover, it actually undertook to do it, and received pay for the service. And it had already transmitted and delivered the dispatch to which this was a reply. Why serve one of the parties and not the other? But we hold that it was bound to serve both, for the reason that the law leaves it free to serve them. Where there is such a statute as we are construing, it cannot be a matter of option to obey or disobey. On the contrary, unless some other law forbids what the letter of the statute commands, the letter must prevail. In adjudicating upon a like statute, the supreme court of Indiana, in *Western Union Tel. Co. v. Ferguson*, 57 Ind. 495, held that the company, when sued for the penalty incurred by failing and refusing to transmit a dispatch expressed in these terms, "Send me four girls, on first train to Francisville, to tend fair," could not defend by setting up that the dispatch was

ambiguous, and that, on account of certain extrinsic facts, the company had reasonable cause to believe, and did believe, that the girls wanted were prostitutes, and that the object of the message was to draw prostitutes to the fair. It seems to us that this decision was correct. It did not appear that the company or its servants would have been subject either to indictment or to action if the girls called for had been sent and had attended the fair. When a dispatch is ambiguous, the law would give the benefit of the ambiguity to the company in dealing with it either civilly or criminally for transmitting the dispatch, and hence, it would be the duty of the company, in deciding whether to transmit or not, to give the benefit of the doubt to the sender. On no other rule would it be practicable for telegraph companies to perform their legitimate functions as servants of the general public. They could not wait to question and investigate the motives of those who offer ambiguous dispatches for transmission. Indeed, in this state, they are required, by the same statute we are now discussing, to forward dispatches written in cipher, and this enables the sender not only to conceal his motives partially, but to conceal them altogether. This may serve to suggest how little the company is concerned with unlawful or improper motives, unless they are plainly disclosed on the face of the dispatch.

The cases of *Bryant v. Western Union Tel. Co.*, 17 Fed. Rep. 825, and *Smith v. Western Union Tel. Co.*, 84 Ky. 664, were not ruled upon any statute, but upon principles of general law. Doubtless it is true that a telegraph company is not bound, even when it contracts to do so, to furnish to "bucket shops" reports of the market prices of stocks and provisions, nor to allow "tickers" for the purpose to remain in the offices of these immoral establishments. But were the supplying of market reports and "tickers" for all applicants, "with impartiality and good faith," enjoined by statute, a different question, and one more germane to the present case, might arise. The Sunday messages adjudicated upon in some of the cases are also without relevancy, for the statute does not purport to prescribe duties, except as to dispatches offered "during the usual office hours," meaning, of course, legal office hours. So far as we are aware, no decision of any court is to be found which holds it illegal for a telegraph company to receive and transmit messages relating to speculative transactions in futures, where that class of business has not been made penal by statute. That damages for the breach of a contract to correctly trans-

mit a message of that nature cannot be measured by the results of such dealings was decided in *Cothran v. Western Union Tel. Co.*, 83 Ga. 25, but there is no suggestion in that decision that the broken contract was unlawful. On the contrary, this language will be found in the opinion: "We think this standard cannot be invoked, for the reason that contracts relating to 'futures' are illegal, and we see not how an illegal contract can be called in to measure the damages sustained by reason of the breach of a legal contract." There may be strong reasons of public policy why legislation ought to prohibit all dealings in futures and all communication by telegraph tending to foster or facilitate such dealings, but in the present state of the law, no matter how reluctant telegraph companies may be to transmit and deliver messages of this class, especially if their reluctance arises after they have accepted pay for doing it, they have no option but to perform the service or pay the penalty.

Judgment reversed.

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**TELEGRAPH COMPANIES—DUTY TO ACCEPT AND TRANSMIT MESSAGES.—** A telegraph company cannot be required to communicate a message which is to furnish the means of carrying on an illegal business: *Smith v. Western Union Tel. Co.*, 84 Ky. 664. Telegraph companies are public servants, and are bound to act whenever called upon, their charges being paid or tendered: *Western Union Tel. Co. v. Dubois*, 128 Ill. 248; 15 Am. St. Rep. 109; *Fowler v. Western Union Tel. Co.*, 80 Me. 381; 6 Am. St. Rep. 211; note to *Western Union Tel. Co. v. Blanchard*, 45 Am. Rep. 487; note to *Birney v. Printing Tel. Co.*, 81 Am. Dec. 613.

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## GRESHAM v. EQUITABLE ACCIDENT INSURANCE CO.

[87 GEORGIA, 497.]

**ACCIDENT INSURANCE—FIGHTING—CONSTRUCTION OF POLICY.—** When the death of the insured is caused by a gunshot wound inflicted by another, and is the direct result of a mutual encounter or combat, voluntarily entered into by them, no recovery can be had under a policy of accident insurance excepting the company issuing it from liability for death or injury caused by fighting. In such case it is immaterial whether the slayer was sane or insane.

*Broyles and Sons, J. D. Cunningham, and J. A. Austin*, for the plaintiff.

*Candler and Thomson*, for the defendant.

BLECKLEY, C. J. The policy covered bodily injuries inflicted by external, violent, and accidental means. It ex-

cepted, however, various classes of accidental injuries which might be embraced in these general terms, among them those caused by dueling, fighting, wrestling, etc.; and those happening in consequence of voluntary exposure to unnecessary danger, hazard, or perilous adventure, or while engaged in, or in consequence of, any unlawful act; and all injuries the result of design, either on the part of the claimant or any other person. It may be conceded that the homicide was accidental within the meaning of the policy as such policies have generally been construed by the courts: *Ripley v. Railway Passenger Assurance Co.*, 2 Bigelow's Life and Accident Cases, 738; *Hutchcraft v. Travelers Ins. Co.*, 87 Ky. 300; 12 Am. St. Rep. 484; *Phelan v. Travelers Ins. Co.*, 38 Mo. App. 640; *Richards v. Travelers Ins. Co.*, 89 Cal. 170; 23 Am. St. Rep. 455; *Supreme Council v. Garrigus*, 104 Ind. 133; 54 Am. Rep. 298; notes to *Paul v. Travelers Ins. Co.*, 8 Am. St. Rep. 763; Bliss on Life Insurance, secs. 396, 397; 5 Lawson's Rights, Remedies, and Practice, secs. 2140 et seq.; 1 Am. and Eng. Ency. of Law, 87 et seq.; 7 Am. Law Rev. 585; same article, 8 Alb. L. J. 85. It may be conceded, also, that though the killing was manifestly willful on the part of the slayer, it was open to question whether it was the result of design, — that is, of rational design, — inasmuch as there was some evidence tending to show that the slayer might have been insane. It may likewise be conceded that had the case turned alone on the question whether, at the time the insured was shot, he was engaged in an unlawful act, there was some evidence for consideration by the jury. The evidence as a whole might warrant a negative finding on this point, according to some of the authorities, though not so, perhaps, according to the spirit of others: *Cluff v. Mutual Ben. L. Ins. Co.*, 13 Allen, 308; *Bradley v. Mutual Ben. L. Ins. Co.*, 45 N. Y. 422; 6 Am. Rep. 115; *Harper v. Phoenix Ins. Co.*, 19 Mo. 506; *Travelers Ins. Co. v. Seaver*, 19 Wall. 532; *Bloom v. Franklin Ins. Co.*, 97 Ind. 478; 49 Am. Rep. 469. But if the view we entertain of the law is correct, the matter on which, after close study, there could be no two opinions, no reasonable doubt in impartial and intelligent minds, is, that the injury which resulted in death was caused by fighting. Shooting caused the injury, and fighting caused the shooting. The cause of the cause was the real cause of the event. Fighting may cause death by causing a contemporaneous act which causes death. In such case the first causal agency is not too remote, though the event be related to it only in the second

degree of lineal descent. It is not every fight, however, in or from which a mortal injury might be received by the insured, which could be regarded as the cause of the injury or of death resulting therefrom. A faultless and unwilling conflict by the insured, one which he neither provoked nor invited, one which he did not accept when formally or informally tendered, one in which he was forced to engage for self-defense alone, and from which he withdrew, or endeavored in good faith to withdraw, when his defense was accomplished, ought not to, and would not, be treated as a causative fight on his part, within the meaning and intent of the policy, but would be regarded as right and proper resistance to aggressive or offensive violence. To protect his life from destruction or his person from injury might be as much a matter of duty to the insurance company as of interest to himself. Means of resistance which it would be reasonable for him to employ for his own safety, he could not be excused for neglecting, if an efficient use of them were shown to be within his power. It would be no objection to their use that they involved "fighting back" in order to repel the violence of an assailant. The stipulation against liability for injuries caused by fighting refers to voluntary fighting by the insured, or involuntary fighting brought on wholly or partially by his fault or temerity, — fighting for which he is partly responsible, either as a volunteer, or as a rash speaker or a wrong-doer. It could not be the purpose of the stipulation to cut off the right of self-defense by the use of force, — the right to repel violence with violence of like nature. The exercise of this right might be mutually beneficial to both of the contracting parties; and that either of them had any purpose to restrict a fair and reasonable exercise of it is in the highest degree improbable. In order to attribute to the insured anything caused by the fight, he must have had some voluntary agency in causing the fight itself. If he had such agency, if by improper speech or voluntary conduct he was a material factor in bringing on the fight, he was, as between himself or his wife and the insurance company, chargeable with the consequences. If the fight was the cause of the mortal injury, and he was the cause of the fight, whether in whole or in part, he was, to that extent, the cause of his own death. If he be-  
gat the fight, and the fight be-  
gat the shooting, and the shoot-  
ing be-  
gat the injury, he bore an ancestral relation to the last offspring as well as to the first. At all events, being father to the fight, neither he nor his wife, under the terms of this pol-

icy, could profit by the fight or by what it brought forth. That, according to the evidence in this case, there was a fight, admits of no possible question. There was hostile contact, physical collision, an attempt by each combatant to hurt the other; blows were given by one, which took effect; strokes were made by the other, which missed their aim.

The origin of the fight is equally manifest. It was not born of the passion of one of the parties, but of a conjunction of the passions of both. It proceeded from an altercation in which each party used rash and insulting language, language calculated to excite anger and provoke conflict. Both being in the same room, but some distance — say twenty feet — apart, the other party spoke abusively of secret societies and their members, referring to them in general terms, no particular society or member (so far as appears) being mentioned. This speech was made in the hearing of the insured and several others, but was not addressed to him. Some of the others, who were nearer to the speaker, remonstrated with him upon the impropriety of his animadversions. Shortly afterwards, as the speaker was passing by the insured on his way out, the latter, without rising from his seat, said to him mildly, in a tone of mortified resentment: "I heard all you said about secret societies, — that no gentlemen would belong to a secret society." The other answered: "Yes, I said it, and by G—d, it is true. Do you want to take it up?" The insured replied, "Well, it's a lie," or "a damned lie," adding, "Yes, I do." Then followed a blow from one of them, probably the former, and the latter "stumbled off his seat," possibly as the result of receiving the blow. They backed towards one of the entrances to the room, several feet, and the insured was stricken by his antagonist several times with a small walking-cane, which was broken over his shoulders. The insured struck back with his hands without effect, several of his blows missing their aim. Then, while the other maintained his position close to where the fight took place, the insured moved back ten or twelve feet to the seat which he had occupied, and looked for and inquired after his hat, which had fallen or been knocked from his head. The other combatant, without changing his position, then drew a pistol and fired the fatal shot. Before anything above referred to was said or done, the parties were aware of each other's presence in the room; they had spoken together in a friendly way, each calling the other by his first, or christian, name. In substance, this is the whole



story of the quarrel, the fight, and the homicide, as told by the testimony. The first insult came from the slayer, attended with a challenge to fight. The question, "Do you want to take it up?" propounded in anger, does not, according to the common understanding of it in Georgia, import a proposal to debate or discuss, but a challenge to the arbitrament of force or a trial of the issue by the personal prowess of the disputants. It is the end, not the beginning, of argument. It is no less significant of defiance than was the ceremony of throwing down the glove as a preliminary to trial by battle. The insult was returned by the insured by responding in words of foul opprobrium, — words so irritating that gentlemen rarely address them to their equals, except when they intend to back them with their courage; and to make the intent clear in this instance, the challenge was accepted in the superadded phrase, "Yes, I do." Instantly active hostilities commenced, each party having thus declared his willingness to champion his side of the trivial and needless quarrel. Had not both of them acted with hot-headed rashness in passing insults, there would have been no fight. Had the insured squarely objected to fighting and tried to keep out of it, there is no reason to suppose he would have failed of success. Instead of so doing, he provoked his adversary by giving him the lie, most probably with a profane prefix to the offensive imputation; and instead of pursuing a pacific policy, he accepted what he must have understood as a challenge to fight. No doubt he was under the influence of strong passion, but this is no excuse for him in the present litigation. The fighting was in a public place, — that is, a place to which a portion of the public habitually resorted. It was in a room occupied and used as a saloon and restaurant, in the city of Atlanta. The fight, merely as such, was a joint offense, and would be classified, under our code, as an affray: Code, sec. 4515.

This is true notwithstanding the evidence indicates none of the blows dealt by the insured took effect, and that the first blow, as well as all others which reached their object, came from his antagonist. In so far as the constituents of a fight are concerned, the consent of both parties makes the consequent violence of either chargeable to both. "We think the judge was in error in saying there must be mutual blows to constitute a mutual combat. There must be a mutual intent to fight. But we think if this exists, and but one blow be stricken, that the mutual combat exists, even though the first



blow kills or disables one of the parties": *Tate v. State*, 46 Ga. 157, 158 (McCay, J.). To the like effect is a dictum by Chief Justice Pearson of North Carolina, who says: "Is it necessary that both parties should give and take blows? or is it sufficient that both parties should voluntarily put their bodies in a position to give and take blows, and with that intent? To illustrate: Suppose Rippy had not been killed. Upon an indictment for an affray, would he not have been convicted? Two men go out to fight. One is knocked down on the 'first pass,' and that is the end of it. Are they not both guilty of an affray? That is, 'a fight by mutual consent'": *State v. Gladden*, 73 N. C. 155. We are no less certain that the fight was a mutual combat, in the legal sense, than if it had been so found by the verdict of a jury under a full and proper charge from the presiding judge. And the palpable truth that fighting caused the shooting, and therefore the injury, needs confirmation by verdict just as little. The evidence is all one way; but one rational inference is possible. The shooting is accounted for easily and naturally by ascribing it to the fight. This is the proper explanation of it, whether it be regarded as a part of the fight proper, or as a sequel to it. It was certainly embraced within the *res gestæ* of the combat. It took place on the same stage, and within the atmosphere of the antecedent performance. The homicide could well be treated as the culmination of the final scene, the catastrophe of the drama. At the very least, it was a bloody epilogue, and not an independent afterpiece. Nor is it material that it was not down on the bill, but was wholly unexpected by one or both of the actors. Rarely, if ever, can the incidents or the result of a personal encounter be foreseen. A deadly weapon may make its appearance at the last moment, and a homicide be the result, although the fight intended and begun was one with "fist and scull" only. To fight at all is dangerous. When the combative passions are aroused and get a taste of gratification, what momentum they will acquire, and to what extremes it will carry them in their lust for more, is always uncertain. Even friendly wrestling is a door by which anger and a mortal wound may come in. Knowing the hazards attendant on physical competition and contention, this insurance company declined to assume the risk of accidental injury or death caused by fighting or wrestling. The insured might fight if he pleased, but he was not

allowed to indulge his combative propensities at the expense of the company; that kind of indulgence was to be at his own risk. Not that the company might not have borne the risk for him if it had chosen to do so. In the language of Judge Scott in *Harper v. Phœnix Ins. Co.*, 19 Mo. 509: "Unless it is otherwise stipulated, the insurer takes the subject insured, with his flesh and blood and passions; the dangers to which the lives of men are exposed from sudden ebullitions of feeling are a lawful matter of insurance." But in the policy before us the company has "otherwise stipulated." By so doing it has narrowed the range of the policy over the emotions, so as to shut out all those of a pugnacious character. If both combatants contributed to bring on the fight, their relative blame or guilt has nothing to do with the relation of cause and effect between it and the homicide. Nor is it of any moment to consider whether the offense committed in the end was murder or manslaughter. With or without malice, in the technical sense of criminal law, the homicide was caused by the fight, as causation is understood and regarded in the law of contracts. The fight occasioned it, for the fight produced the shooting as a direct and immediate consequence. Who can doubt that the shooting grew out of the fight,—sprang from it directly and immediately? Had there been no fight, there would have been no shooting and no killing. It was the fight that excited the homicidal impulse, generated the desire and the purpose to kill. There was nothing else to do it. Even if the slayer was insane or subject to homicidal mania, the mania alone was harmless; it required the superadded excitement of the fight to render it destructive. Had the insured abstained from provoking the fight or accepting a challenge, had he contributed nothing towards bringing on a useless combat, there is no probability whatever that he would have been slain. And he could no more provoke a crazy man, or accept his challenge, at the expense of the insurance company, than he could so deal with a sane man at the company's expense. Indeed, it would be more hazardous to engage in an affray with a madman than with a rational being; and any reason for protecting the company against the consequences of the less dangerous fighting will apply with increased force to the more dangerous. Injuries caused by rash or needless fighting with any description of combatant are excluded from the scope of the policy.

The nonsuit was properly awarded, and we have stated our reasons very fully for so deciding.

Judgment affirmed.

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**INSURANCE, LIFE — DEATH IN VIOLATION OF LAW.** — A policy of insurance was conditioned to be void if the insured should die in violation of law. He was killed while making a criminal assault, and the policy was declared forfeited: *Bloom v. Franklin etc. Ins. Co.*, 97 Ind. 478; 49 Am. Rep. 469, and note.

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## HUDSON v. HUDSON.

[87 GEORGIA, 678.]

**WILLS — DEVISE — AGREEMENT TO MAKE — PARENT AND CHILD.** — Where a son removes from his own home to that of his father, under an express agreement between them that the father will devise to such son his home place if the son will attend to and take care of him for life, and the son performs his part of the contract, while the father fails to perform because of his subsequent insanity, the son is entitled to recover for his services from his father's administrator upon a *quantum meruit*.

**CONTRACT BETWEEN FATHER AND SON NOT CHANGED BY SUBSEQUENT CONTRACT BETWEEN CHILDREN.** — A contract between father and son, by which the latter undertakes to attend to and care for the former during his life, on consideration that the father is to will his home place to such son, is not changed, after part performance by the son, by an agreement entered into by the father's children, after his insanity has rendered him incapable of performing his part of the original contract.

**WITNESSES — COMPETENCY — RELATIONSHIP.** — A son is a competent witness in his own behalf to answer the testimony of his brother acting as administrator of their father, as to matters which occurred between them previously to the death of their father, not in his presence, and in which he did not in any way participate.

*George W. Gleaton*, for the plaintiff.

*A. C. McCalla and J. N. Glenn*, for the defendant.

**LUMPKIN, J.** 1. An old and infirm father proposed to one of his sons that if the latter would remove from his own home to that of the former, and attend to and take care of him during his lifetime, he would will to the son his home place. The son accepted this offer, and according to the evidence, complied faithfully with his part of the contract. Some time after his removal to his father's place, the old man became insane, and remained in that condition until his death, so that it was impossible for him to make the promised will. Nevertheless, the son continued his ministrations until the father's death. The old man required constant nursing and attention.

Most of the time he was altogether as helpless as an infant, and the care of him involved considerable time, watchfulness, and labor, and the performance of services menial and disagreeable in the highest degree. From all the circumstances shown by the proof, it is perfectly manifest that when the arrangement between the father and son was originally entered into, both parties contemplated that the son would be entitled to and should receive compensation for his services, and it was not a case in which it was expected that these services would be performed on account of mere filial duty and affection. It also appears that the son received ninety-six dollars per year, which came to the father as a pension from the government, and that he received and used the rents, issues, and profits of the father's land and stock thereon, in excess of what was required for the father's support. It was certainly not incumbent on the son, after the father became insane, and consequently incapable of making the promised will, to abandon his part of the contract; but he had the right, and it was his duty, to continue taking care of his father as he had agreed to do. The latter having become unable to comply with his part of the contract, the son had a right to regard it as one that never could be literally performed, and the existing circumstances were such as to justify him in continuing to render the necessary services to his father, with the right to be paid for the same. Indeed, it was held in *Lisk v. Sherman*, 25 Barb. 433, a case very similar to this, that the plaintiff was entitled to recover only the actual intrinsic value of the services rendered, for the time they were rendered, and according to their kind and character, without reference to the contract or the value of the property which deceased had agreed to leave him as compensation for such services. Again, in *Graham v. Graham's Ex'rs*, 34 Pa. St. 475, it was held that a parol contract of a decedent to give to the plaintiff a certain portion of his estate, in consideration of services rendered, could only be enforced when clearly proved, and when its terms were distinct and certain; and also that the measure of damages for the breach of such a promise was the value of the services rendered, and not the proportion of decedent's estate promised to be given. See also *Thompson v. Stevens*, 71 Pa. St. 161.

If, by a proceeding in the nature of a bill to compel a specific performance of the father's contract, the plaintiff would be entitled to recover the home place from the administrator of his father, he would of course be obliged to account for what

he had already received in money, rents, etc., during the lifetime of the deceased. This being true, and it being manifest from the evidence that the son is undoubtedly entitled to compensation in some way for his services, it seems the fairest and best way of adjusting these matters is to allow the son to recover of the administrator, upon a *quantum meruit*, the actual value of his services, but the amount must in no event exceed the value of the home place, and he must account for, and have deducted from the full amount he is entitled to, all he has received from the property of the father over and above what was necessary for the support and maintenance of the latter during his lifetime. The above authorities sustain the propriety of giving this direction to the case. By his declaration as amended, the plaintiff simply seeks to recover what his services were worth, and after much consideration we regard this as the proper and legal way to solve the problem, and accordingly so direct.

2. It is manifest, without discussion, that whatever may have been the original contract between the father and son, it could not be changed by any agreement or understanding, if there were such, made by the children after the father became insane.

3. The plaintiff was a competent witness in his own favor to answer the testimony of the administrator concerning matters which occurred between them before the death of the father, not in the presence of the latter, and in which he did not in any way participate.

4. On the trial, the jury returned the following verdict: "We, the jury, find for the plaintiff, above what he has already received from all sources, the sum of \$600 principal, and interest \$119." The court set this verdict aside, and granted a new trial. The evidence does not accurately disclose what the rents, etc., which the plaintiff had received amounted to, and it is therefore impossible to determine from the record upon what basis of calculation the jury arrived at the amount they found in favor of the plaintiff. For this reason, we will not interfere with the discretion of the trial judge in granting a new trial, but will allow the judgment of the court below to stand, and the case to be again tried, with such light thrown upon the law of it as may be gathered from the head-notes and this opinion.

Judgment affirmed.

**WILLS — AGREEMENT TO MAKE — VALIDITY OF.** — One may make a valid agreement binding himself legally to make a particular disposition of his property by will: *Johnson v. Hubbell*, 10 N. J. Eq. 332; 66 Am. Dec. 773, and extended note, with full discussion of the subject.

**WITNESSES — PARTY AS WITNESS AGAINST DECEASED PERSON.** — In an action by an heir to recover possession of realty, the defendant is a competent witness, notwithstanding the death of the plaintiff's ancestor under whom both claim, except as to such matters as transpired between the defendant and such ancestor: *Terry v. Rodahan*, 79 Ga. 278; 11 Am. St. Rep. 420, and note.

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**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**KANSAS.**

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**WOODMAN v. INNES.**

[47 KANSAS, 26.]

**CONTRACTS — PUBLIC POLICY — LOCATION OF PUBLIC OFFICE — POST-OFFICE.**

— Any contract made for the purpose of securing the location of a public office, such as a post-office, in any certain part of a city or elsewhere, or which prevents, or tends to prevent, the change or removal of such office, when the necessities of business or the interest of the public demand such change or removal, is opposed to public policy and void, as tending to the injury of the public service, and as subordinating the public welfare to individual convenience or gain.

*Harris and Vermilion*, for the plaintiffs in error.

*Dale and Wall*, for the defendants in error.

**HORTON, C. J.** The material facts of this case are as follows: The firms of Innes and Ross and Aldrich and Brown, in 1882, owned property and were engaged in business on Main Street, in the city of Wichita, in this state, near the building where the post-office in Wichita was kept. They were desirous of having the post-office remain in the building near their place of business, and as an inducement to have the post-office remain in the building, on the 1st of October, 1882, they executed and delivered to W. C. Woodman their written contract, whereby they agreed to pay him, as part of the rent for the post-office building, the sum of seventy-five dollars every three months. The post-office was continuously kept in the building on Main Street up to the 1st of October, 1886, and the firms of Innes and Ross and Aldrich and Brown paid the rent up to the first day of October, 1885, but refused thereafter to pay any further rent. On the 24th of December, 1886, W. C.



Woodman commenced his action to recover \$303.96 for the residue of the rent, which he claimed to be due upon the written contract. While the action was pending in the court below, W. C. Woodman died, and his executors were substituted, by the order of the court, as plaintiffs. Upon the trial the defendant objected to the introduction of any evidence. The court sustained the objection, holding that the contract was against public policy, and therefore void. We approve of the ruling of the trial court. It was decided in *St. Joseph etc. R. R. Co. v. Ryan*, 11 Kan. 609, 15 Am. Rep. 357, that a contract not to have or use a depot within three miles of a given point was against public policy, and void. It was said in that case, among other things, that "railroad corporations are, as we have seen, public agencies, and perform a public duty. They are agencies created by the public, with certain privileges, and subject to certain obligations. A contract that they will not discharge, or by which they cannot discharge; those obligations is a breach of that public duty, and cannot be enforced. They are under obligations to use the utmost human sagacity and foresight in the construction of their roads, to prevent accidents to passengers. A contract that they will not use such sagacity and foresight certainly cannot be upheld. They are under obligations to employ skillful and competent engineers to manage their engines, and other competent employees to superintend and take care of the running of their trains. A contract that they will not employ such agents and servants is certainly void. They are bound to furnish reasonable facilities for the transportation of freight and passengers, both as to the quality and quantity of cars and coaches and the number of trains, and a contract not to furnish such facilities will not be tolerated. So though one train a day with one freight-car and one passenger-coach might be at present amply sufficient to do all the business between two given places, yet a contract never to run but one train a day with the one car and coach could not be upheld, for the necessities of trade and travel are varying, and it is the duty of the company to adjust its capacities and facilities for business to these varying necessities. Upon the same principle, it is the duty of a railroad company to furnish reasonable depot facilities. The number and location of the depots, so as to constitute reasonable depot facilities, vary with the changes and amount of population and business. A contract to leave a

certain distance along the line of the road destitute of depots is in contravention of this duty."

Under the allegations of the petition, the location of the post-office in this case was to be restricted to one place. The government locates only one post-office in a city, and such office is a public one, and the general public has an interest in the location of the office. Any contract which is made for the purpose of securing the location of such an office, or which prevents, or tends to prevent, the change or removal of such an office, when the necessities of business or the interest of the public demand a change or removal, tends to the injury of the public service, and therefore is against public policy. Such contracts as referred to in the petition tend to improperly influence those engaged in the public service, and also tend to subordinate the public welfare to individual convenience or gain. Parties should not be permitted to make contracts which induce personal or private interest to overbear public duty or public welfare: *Elkhart County Lodge v. Crary*, 98 Ind. 238; 49 Am. Rep. 746.

Counsel for plaintiffs say that the written contract of the parties is enforceable, because it is not shown that it is unfair, or that any undue influence was to be used to retain the post-office on Main Street. Such contracts lead to secret, improper, and corrupt influences, to the injury of the public. In this view, we cannot think it good policy for the courts to enforce such contracts.

"All agreements for pecuniary considerations to control the business operations of the government, or the regular administration of justice, or the appointments to public offices, or the ordinary course of legislation, are void as against public policy, without reference to the question whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements, and it closes the door to temptation by refusing them recognition in any of the courts of the country": *Providence Tool Co. v. Norris*, 2 Wall. 45.

If W. C. Woodman had no control over the location of the post-office, or if he could not, by his influence, representations, or otherwise, induce the United States post-office department to permit him to retain the post-office upon Main Street, then the contract sued upon was wholly without consideration, and for that reason ought not to be enforced.

The case of *Beal v. Polhemus*, 67 Mich. 130, which is referred

to as fully sustaining the petition, is somewhat different in its facts, but all said therein is not satisfactory to us.

The judgment of the district court will be affirmed.

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**CONTRACTS — PUBLIC POLICY.** — A contract to secure the removal of a post-office, and the appointment of one as postmaster, is against public policy, and void: *Filson v. Himes*, 5 Pa. St. 452; 47 Am. Dec. 422, and note. An agreement by a railroad company to build and maintain its depot at a certain place, and nowhere else in a certain city, is against public policy, and void: *Williamson v. Chicago etc. R'y Co.*, 53 Iowa, 126; 36 Am. Rep. 206, and extended note.

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## MASTIN v. LEVAGOOD.

[47 KANSAS, 33.]

**NEGLIGENCE. — WHEN ANY VOLUNTARY ACT MAY NATURALLY RESULT IN INJURY TO ANOTHER**, the actor must see to it, at his peril, that injury does not follow, or he must respond in damages therefor, no matter what the motive or the degree of care with which the act is performed.

**MASTER AND SERVANT — DANGEROUS MACHINERY — NEGLIGENCE.** — The owners of a thrashing-machine are guilty of gross negligence in leaving its bevel wheel and cogs uncovered, knowing them to be thus imminently dangerous to human life. A laborer about the machine, who, being ordered to oil the cylinder, is injured while attempting to perform such act, by coming in contact with such bevel wheel and cogs without knowledge of their dangerous condition, may recover from the owners of the machine, whether he was their servant at the time or not.

**NEGLIGENCE — DANGEROUS MACHINERY — DUTY OF OWNER.** — Where the dangerous condition of machinery is foreseen and pointed out to the owner, the duty is imposed upon him to adopt every possible precaution to avoid injury to those working about it. His failure to perform such duty makes him liable for all resulting injury.

**NEGLIGENCE — CONTRACT RELATIONS.** — When an act of negligence is imminently dangerous, the actor is liable to a party injured, whether there is any relation of contract between them or not.

*Keller and Dean*, for the plaintiffs in error.

*Grattan and Grattan*, for the defendant in error.

**SIMPSON, C.** The plaintiffs in error were the two-thirds owners of a horse-power thrashing-machine, the other third being owned by the father of one of them. When they went to a farmer's for the purpose of thrashing his wheat with their machine, they furnished two feeders, one man to drive the horse-power, and one man to measure the grain, it being the duty of the farmer for whom they were thrashing to furnish pitchers, and the other necessary help. On the sixteenth day

of September, 1886, the plaintiffs in error were engaged in thrashing grain for one Pampella, with a Nichols and Shepherd horse-power machine. E. E. Mastin was driving, and Jack Mastin was feeding. Galbreth, whom the Mastins brought to the Pampella farm to feed, had traded work with one Rankin, who was in the employment of Pampella, and Rankin was feeding. Galbreth was hauling grain away from the machine. York, an employee of the Mastins, was measuring the grain. This defendant in error was pitching from the stack, and he was an employee of Pampella. During the work, and at about four o'clock, P. M., of the 16th of September, 1886, Jack Mastin was feeding, and was taken sick, and called to Rankin to take his place. Rankin did so, and recollecting that he had not recently oiled the cylinder, and knowing that Jack Mastin was sick, called to the defendant in error, who was pitching grain from the stack to the feeder, to oil the cylinder. The machine in use was a vibrator, of the Nichols and Shepherd pattern. The large iron wheel revolves rapidly, and when so revolving the exposed bevel wheel and cogs are imminently dangerous to human life and limb. The manufacturers of the machine make a strong iron shield to be placed over the wheel and cogs, to render it safe to oil the cylinder, or to do other work about it. In operation the straw naturally lodges on, over, and about the wheel and cogs, and conceals them, and makes it necessary, when any one is about to oil the cylinder, to remove the straw, and this is generally done with the hand. The shield had become so impaired that it was impossible to fasten it, or it would require great extra work to do so. It seems to be admitted that when the shield was not on the wheel and cogs were eminently dangerous, and there is no question but that during the two days' thrashing at Pampella's, and at the time the defendant in error lost his hand, the shield was not on, and the wheel and cogs were uncovered, except as hidden by the straw. To oil the cylinder, one has to reach up and over the shield to get the oil cup, and when the shield is on it can be oiled without danger. When the shield is off, and one knows it, to avoid imminent peril the oil can is reached in an opposite direction from that used when the shield is on. The defendant in error, having inquired, was told where the oil-can was, and went to the side on which the large iron bevel wheel is situate, at a point where the tumbling-rods connect with the horse-power, and the wheel revolves rapidly in cogs on the end of the cylinder, at

tempted to brush away the straw covering up the wheel, when his hand was caught in the cogs of the bevel wheel and was mashed. He brought this suit to recover damages for the loss of his hand, and was awarded \$1,331. The jury returned answers to special interrogatories as follows:—

“1. Did not the plaintiff know, at and before the time he attempted to oil the cylinder, that the shield was off the bevel pinion? A. No.

“2. Did not the plaintiff know that it was dangerous, if it was dangerous, to attempt to oil the cylinder when the shield was off? A. No.

“3. Could not the plaintiff, in the exercise of ordinary prudence and care, have known that the shield was off? A. No.

“4. Would not the plaintiff have known that the shield was off if he had been ordinarily attentive to what he saw about the machine, and what he heard said by the defendants or others? A. Plaintiff did not know it was off.

“5. How much damage, if any, do you allow on account of the physical and mental suffering of the plaintiff? A. \$100.

“6. How much damage, if any, do you allow on account of the loss of plaintiff's hand? A. \$997.

“7. How much damage, if any, do you allow on account of plaintiff's expenditures for medicine and surgical services? A. \$130.

“8. What sum of money, if any, do you allow as exemplary damages? A. None.”

The admitted fact is, that the uncovered bevel wheel was very dangerous. It is established by the evidence, and there is no controversy as to the fact, that the owners of the machine knew that it was uncovered, that they had been warned of the dangerous consequences, and that they were guilty of gross negligence for using it in that condition. It is equally clear from the evidence, and the jury so find, that the defendant in error did not know that the bevel wheel was uncovered, and that the shield was not on. Now, on this state of facts, separate and apart from any contractual relations, or any question as to the attitude of these parties as master and servant, the operation of this machine in its dangerous condition imposed a duty on the owners and operators thereof toward all who were engaged in the work, or who, by any possibility, in the discharge of duty or in the performance of labor, might be brought in contact with it, that was certainly disregarded. For it may be stated as a general rule, that where any volun-

tary act may naturally result in the injury of another, the actor must see to it, at his peril, that injury does not follow, or he must respond in damages therefor; and this is true regardless of the motive or the degree of care with which the act is performed: *Hay v. Cohoes Co.*, 2 N. Y. 159; 51 Am. Dec. 279; *Tremain v. Cohoes Co.*, 2 N. Y. 163; 51 Am. Dec. 284; *Cahill v. Eastman*, 18 Minn. 324; 10 Am. Rep. 184; *Phinizy v. Augusta*, 47 Ga. 260; *St. Peter v. Denison*, 58 N. Y. 416; 17 Am. Rep. 258; *Wilson v. New Bedford*, 108 Mass. 261; 11 Am. Rep. 852; *Scott v. Bay*, 3 Md. 431; *Cooper v. Randall*, 53 Ill. 24; *G. B. & L. R'y Co. v. Eagles*, 9 Col. 544.

This rule applies to these plaintiffs in error in all its vigor. They operated the machine with the knowledge that the uncovered wheel was imminently dangerous to those working around it. They did this, too, after warnings that injurious consequences were liable to follow such use. The injuries resulting to the defendant in error were the natural and probable result of the use of this machine with the cogs and wheel in this uncovered condition. Its danger was foreseen and pointed out to the owners, and the duty was imposed upon them to adopt every possible precaution to avoid such a consequence. It seems clear to us, under the uncontradicted evidence respecting the danger of operating the machine in such manner, and of the knowledge of the Mastins of the danger, and of the want of knowledge on the part of the defendant in error that the wheel was uncovered, that the right of recovery is clear and undoubted. It was an act of practical necessity that the machine should be oiled, as the business both of the Mastins and Pampella was to be expedited by it. The feeder, whose business or duty it was to oil when the other feeder was actively engaged at the mouth of the machine, was prostrate on the ground, sick and disabled. Any one working about the machine, either for the Mastins or for Pampella, or for both, could be called upon to do this special work, but when called upon was entitled to have all the necessary protection to save him harmless while performing the special labor. We do not understand that there is any cast-iron rule that forbids a man who is engaged in pitching from the stack from attempting to oil the machine at the request of any one whose duty it is to see that the machine is in proper working condition. The evidence in this particular case shows clearly that, if the shield had been on and the wheel covered, any person could have oiled the machine without any danger to life or limb; hence

the immediate, adequate, and efficient cause of the injury is found in the fact that the wheel was negligently and knowingly left uncovered by these plaintiffs in error. Whatever intermediate acts may have been committed by Rankin or by other employees, the injury must rest for an efficient cause on this act of negligence of the plaintiffs in error. On general considerations growing out of the contract, and the nature of the employment of the defendant in error, he was bound to do and perform, within reasonable limits, any ordinary act expediting the business in which all parties there present were engaged that might be requested or demanded of him. He was designated by some one in authority to pitch from the stack, and he was directed by one who had authority to feed the machine, and to see that it was running properly, and to oil the machine. Both of these acts, and his faithful performance of them, were necessary ones, and expedited the business of both the Mastins and Pampella, and resulted to their benefit. We do not understand that the defendant in error was either a volunteer or an intermeddler, in the common acceptance of the term. He was there as an employee of Pampella, to perform the labor assigned him, subject to the orders and directions of those who had charge of the various branches of the work. Pampella and the Mastins were associated together for a common purpose, and to do a particular part of the work. In the absence of some special controlling direction, the duty of the defendant in error was to do and perform all acts requested of him that were reasonable and he was capable of doing to expedite the associated effort. If the shield had covered the wheel, it would have been a very ordinary act to have oiled the machine when directed to do so by the person that all agree was charged with the duty of seeing that it was properly oiled; hence we regard all this contention about the defendant in error being a volunteer or intermeddler as having no force or bearing. He was rightfully there. It was a part of his duty, under his contract of employment, to do and perform all ordinary acts of which he was capable, and which he was directed to do by those having charge of the work, that was necessarily included in its practical operation. Hence it seems that there is a direct responsibility to him by reason of his rightful presence there, and his lawful participation in the work on the part of the Mastins, independent of the inquiry as to whether he was an employee of the farmer or the owners of the machine.



It seems to be an established fact in this case that the operation of the machine with the uncovered wheel was imminently dangerous, and this is equivalent to saying that the owners of the machine were guilty of gross negligence in its operation. The great bodily harm of some one working about the machine without the knowledge that the wheel was uncovered was the natural and almost inevitable consequence of such gross negligence. The uncovered condition of the wheel imposed upon its owners the exercise of the highest degree of caution. This increase of duty arose out of the nature of the business, and the danger to others incident to the operation of the machine. The duty of exercising great caution by the owners of the machine did not arise out of the contract with Pampella to do his thrashing, but grew out of the wrong being done by the use of an uncovered wheel known by them to be imminently dangerous. The owner of a horse and cart who leaves them unattended in the street is liable for any damage which may result from his negligence: *Lynch v. Nurdin*, 1 Ad. & E., N. S., 29; *Illidge v. Goodwin*, 5 Car. & P. 190.

The owner of a loaded gun who puts it into the hands of a child, by whose indiscretion it is discharged, is liable for damages occasioned by the discharge: *Dixon v. Bell*, 5 Maule & S. 198. The general rule is, that damages for which a party is liable are those, and those only, which are the natural and necessary consequences of his acts: *Kellogg v. Chicago etc. R. R. Co.*, 26 Wis. 267; 7 Am. Rep. 69; *Ryan v. New York Cent. R. R. Co.*, 35 N. Y. 211; 91 Am. Dec. 49. There is this marked distinction between an act of negligence imminently dangerous and one that is not so: the guilty party being liable in the former case to the party injured, whether there was any relation of contract between them or not, but not so in the latter case: *Colegrove v. Harlem R. R. Co.*, 6 Duer, 410; *Burk v. De Castro etc. Co.*, 11 Hun, 357. Where contractors entered into a contract to put a cornice on a mill, the mill-owners to furnish the necessary scaffolding, and the scaffolding furnished, being defective, fell and killed an employee of the contractors, the mill-owners were held liable, because the injury was the natural consequence of their negligence in constructing the scaffolds: *Coughtry v. Globe Woolen Co.*, 56 N. Y. 128; 15 Am. Rep. 387; *Cook v. New York Floating Dock Co.*, 1 Hilt. 437; *Smith v. New York etc. R. R. Co.*, 19 N. Y. 130; 75 Am. Dec. 305. So, in this case, the injury to the defendant in error was the natural consequence of the gross negligence of the owners

of the thrashing-machine in leaving the wheel with its imminently dangerous cogs uncovered. That it was dangerous to human life and limb is unquestioned. That the Mastins knew it was is conclusively established. Despite the warnings of friends and neighbors, they persisted in its use in this dangerous condition. The natural result of this gross negligence was the serious injury of the defendant in error. Their answer to his demand for damages is, that he was not their servant. This answer, addressed to a man who was there in the regular course of employment to aid the accomplishment of the very work for which the owners of the machine had brought it to the farm of Pampella, is not a sufficient one. His duty was to do and perform such acts as assisted in the accomplishment of the common design. He did not direct the work, or had no right to, or was not appointed or selected for that purpose. His duties were assigned by those who had the controlling authority. His duty was obedience to the directions of those in authority, or to those who seemed, from the ordinary course of affairs, to be in authority. In obedience to a direction, a request, or a command by one who was in actual control of the machinery, he attempted to oil the cylinder. The act attempted appears to have been one of absolute necessity, requiring immediate attention. It was an ordinary act, unattended with danger, that any reasonably prudent man could perform without injury, if it had not been for the gross negligence of the Mastins. Rankin, who made the request or gave the direction, was in sole charge of that part of the machinery about which the request was made and the direction given. He had been in charge for two days, with the knowledge, consent, and approval of the owners of the machine. The writer of this opinion is clear in his conviction that, under these circumstances, Rankin was, for all legal purposes, the employee of the Mastins, in charge of this branch of the machinery, responsible for its successful operation, and fully authorized and empowered to do or cause to be done any act that was necessary for the accomplishment of that part of the work; that the defendant in error, by reason of his employment there, was subject to all reasonable orders and directions necessary to the safe conduct of the business by those in authority; that as a matter of law he was an employee of the Mastins to the same extent and to the same degree as if he had been directly employed by them; that the relation of master and servant was established between them by reason of his em-

ployment by Pampella to engage in the associated work of the Mastins and Pampella; that the Mastins are liable to him for injuries caused by their gross negligence because of said employment; and that they are liable both because they used this dangerous machinery, with the knowledge of its danger, and because they failed to exercise reasonable care to protect an employee. The instructions of the court complained of, being in substantial conformity to these views, are not erroneous.

We recommend that the judgment be affirmed.

By the COURT. It is so ordered.

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THE FOLLOWING OPINION in this case was delivered by the court on motion for a rehearing, the court adhering to its former decision. It is reported in 47 Kan. 764.

*“Per Curiam.* We have been asked to re-examine the grounds of the opinion handed down by the commission. We have done so with great care, but the result has not changed our former conviction. The authorities cited by the counsel for plaintiff in error concerning intermeddlers and volunteers do not, we think, apply in this case. At the time that Levagood was injured he was not a mere intermeddler or volunteer. There is some evidence to show that his duties did not require him to confine himself to pitching grain only. On the day of the injury, E. E. Mastin, one of the owners of the thrashing-machine, was driving the horse-power. Jack Mastin and William Rankin were feeders, but Jack Mastin, whose father owned one third of the machine, seemed to act as the boss of the work. When the machine was set up and ready to work, the horse-power got out of fix, and both the Mastins asked Levagood to help fix the machine, and with a wrench he took some caps off the bolts of the machine. Rankin, who is experienced in the running of thrashing-machines, testified, among other things, ‘that he asked Jack Mastin to oil the cylinder, but as he was sick, and down on his knees and hands, gagging from dust, he then told Levagood to oil the cylinder.’ He was asked: ‘Q. It was n’t the part of anybody’s duty to do that except the hands or men running with the machine? A. Well, the thrashing-machine hands, they generally do ask others when they are attending the separator, or sick or something that way, they ask some one that is close by; I have done that. Q. That is n’t the rule, I believe. A. Yes, that has been with us. Q. You have run a machine? A. Yes, sir.’ It also appears from the evidence that when the Mastins were operating the thrashing-machine, a few days before the injury, at Mr. Thresher’s, Mr. Applegood (not a regular feeder) was permitted to feed, and also to oil the cylinder after the shield was off. Jack Mastin, the boss of the work, testified about the accident, among other things, as follows: ‘Well, I don’t know much about it. I was sick, lying down. Levagood came and asked me for the oil-can; I don’t know what he was going to do with it. . . . I told Lavagood I didn’t know anything where the oil-can was. Q. Did you ask him what he wanted to do? A. No, sir. Q. You told him to hunt around? A. Yes, sir.’ On account of the foregoing and other evidence contained in the record, we cannot say that the instructions were erroneous or the verdict unsupported. The motion for a rehearing will be overruled.”

**NEGLIGENCE — LIABILITY FOR WRONGFUL ACT.** — Where an act is unlawful, the actor is liable for any injury done, without reference to the probability that it would cause that particular injury: *Durham v. Muschman*, 2 Blackf. 96; 18 Am. Dec. 133. Negligence consists in doing something that a reasonable man would not do, or omitting to do something that a reasonable man would do, thereby causing unintentional injury to another: *Davis v. Winslow*, 51 Me. 264; 81 Am. Dec. 572. One is liable for the natural and probable consequences of a negligent act: *McDonald v. Snelling*, 14 Allen, 290; 92 Am. Dec. 768, and extended note. One engaged in blasting rock will be liable for an injury caused to one whose safety he might reasonably expect to be endangered thereby, unless he gave timely warning of the blast: *Cameron v. Vandergriff*, 53 Ark. 281.

**MASTER AND SERVANT — DEFECTIVE MACHINERY — LIABILITY OF MASTER FOR.** — It is a master's duty to supply safe machinery for the use of his servant, and he is bound to use reasonable diligence to inform himself of its safety, and the servant has the right to assume that this duty has been performed: *Wootilla v. Duluth etc. Co.*, 37 Minn. 153; 5 Am. St. Rep. 832, and note; extended note to *Shortel v. St. Joseph*, 24 Am. St. Rep. 320; note to *Kelley v. Silver Spring Co.*, 24 Am. Rep. 621; extended note to *Bussell v. Laconia Mfg. Co.*, 77 Am. Dec. 218, in which this subject is thoroughly discussed.

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## STATE v. WOODRUFF.

[67 KANSAS, 151.]

**LARCENY — CONVERSION OF PROPERTY OBTAINED BY FRAUD.** — Where the consent of the owner of a horse to surrender possession for some temporary and legitimate purpose is obtained by a trick or fraud, and the intent of the taker to deprive the owner of his property, and convert it to his own use, is consummated by his total appropriation of such property, he is guilty of larceny.

**APPEAL — ADMISSION OF IMMATERIAL EVIDENCE — NON-PREJUDICIAL ERROR.** — Postal-card notice offering a reward, and giving a description of it and of the alleged thief, are not competent evidence to show that search was made for the accused, and that he fled from the state, but when the admission of such evidence is not prejudicial, it is not ground for reversal.

F. R. Ogg, for the appellant.

S. D. Scott, county attorney, for the state.

JOHNSTON, J. Frank Woodruff was convicted of grand larceny. The information was filed in December, 1890, and charged Woodruff with stealing a roan mare, the property of F. F. Murray, on August 9, 1887, and alleged that since about the time the larceny was committed Woodruff had been a fugitive from justice and absent from the state. At the trial, testimony was given that Woodruff came to the house of J. C. Murray in the latter part of July, 1887, and was employed by Murray to work upon his farm. On the morning of August 9,

1887, he was sent into a field to cut corn for J. C. Murray, but instead of doing so he went to the home of F. F. Murray, who was a son of J. C. Murray, and told him that he had the toothache and desired to go to Olathe to have the tooth extracted, and he said that he wanted to hire a horse to ride to Olathe, stating that he would return the animal about noon of that day. Murray consented, and assisted in saddling and bridling the mare, but he never saw the mare afterward, and never saw the defendant until the fall of 1890, when he was brought from Illinois upon requisition of the governor of the state. When the defendant did not return at noon with the mare, Murray went to Olathe, and with the aid of the sheriff made a fruitless search for Woodruff and the mare. He was not seen at Olathe on that day, but was seen by one witness in possession of the mare at the town of Morse, Kansas. The mare has never been found or recovered.

The defendant insisted that under these facts there was no such trespass and taking as was necessary to constitute the offense of larceny; and he asked the court to charge the jury that if he obtained the possession of the mare with the consent of the owner, and afterward appropriated her to his own use, he could not be convicted of larceny. The court instructed the jury as follows: "If you believe from the evidence that defendant obtained possession of the mare charged in the information to have been stolen, under the pretense that he wanted to ride to Olathe, but in reality with intent to convert her to his own use, and to deprive the owner of his property, that would be a sufficient taking and carrying away to constitute the crime of grand larceny."

Further along in the charge the court instructed that "if you are satisfied from the evidence, beyond a reasonable doubt, that the owner of the mare alleged to have been stolen intended only to part with the possession of the mare, and not with the ownership, and that the defendant took possession of the mare, not for the purpose, as he stated, of riding to Olathe and return, but with intent to convert the mare to his own use, and to deprive the owner of his property therein, and that, in pursuance of such intent, he did convert the mare to his own use, then you ought to find the defendant guilty of grand larceny, as charged in the information."

The instructions given by the court were warranted by the evidence, and correctly stated the law of the case. To constitute larceny, there must be an intentional taking without the

consent of the owner,— an intentional fraud and appropriation of the property to the use of the defendant. If the owner consents to part with the property, there can be no larceny; but the consent must be free and voluntary. Where his consent to surrender possession for some temporary and legitimate purpose is obtained by a trick or a fraud, and the taker intends to deprive the owner of his property and convert the same to his own use, the consent is a nullity, out of which no legal possession or right of possession against the owner can arise. According to the testimony on which the verdict in this case rests, there was no voluntary surrender of the possession of the property for the purposes intended by the defendant; hence the taking was tortious, and against the will of the owner. The jury were warranted in inferring that the defendant never intended to go to Olathe for the purpose of having a tooth extracted, and never intended to return the mare to the owner, but that his real purpose was to steal the mare and convert her to his own use. According to the testimony, he never went to Olathe, never returned the mare, and it appears that he fled from Kansas and took refuge in the state of Illinois, remaining there until he was found and extradited for the commission of this offense. We think that the evidence is sufficient to sustain the verdict, and that the defendant has no cause to complain of the charge of the court: *State v. Williams*, 35 Mo. 229; *State v. Coombs*, 55 Me. 477; 92 Am. Dec. 610; *State v. Humphrey*, 32 Vt. 571; 78 Am. Dec. 605; *People v. Shaw*, 57 Mich. 403; 58 Am. Rep. 372; *People v. Smallman*, 55 Cal. 185; *Smith v. People*, 53 N. Y. 111; 13 Am. Rep. 474; *Miller v. Commonwealth*, 78 Ky. 15; 39 Am. Rep. 194; *People v. Smith*, 23 Cal. 280; *English v. State*, 29 Tex. App. 174; *State v. Anderson*, 25 Minn. 66; 33 Am. Rep. 455; 12 Am. & Eng. Ency. of Law, 770.

The introduction in evidence of a postal-card notice given by the sheriff, offering a reward for the stolen mare, giving a description of her, and a description of the defendant, is another ground of complaint. It was offered in connection with the evidence of the under-sheriff, who testified that at the instance of Murray, and while he had the warrant in his hands, he searched for the defendant and the mare in and about Olathe; and to aid in finding them, they had printed a large number of such postal cards, and distributed them over the states of Kansas and Missouri. It was competent to show the search for the defendant, and that he fled from the state, but

a copy of the printed postals which were mailed was hardly competent evidence. The reception of the notice, however, was not prejudicial to the defendant, as the testimony conclusively showed that he obtained the mare upon the representation that he was going to Olathe, that he did not go to Olathe, that he never returned the mare to her owner, and that he fled the state and became a fugitive from justice. Under such a state of facts, the reception of the printed postal was immaterial and harmless.

There are no other objections which require notice, and finding no error in the record, the judgment of the district court will be affirmed.

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**LARCENY BY FALSE PRETENSES.** — If by means of any trick or artifice the owner of property is induced to part with the possession only, still meaning to retain the right of property, the taking by such means, if done *animo furandi*, is larceny: *Commonwealth v. Eichelberger*, 119 Pa. St. 254; 4 Am. St. Rep. 642, and note.

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## HILL v. WAND.

[47 KANSAS, 340.]

**DEFINITION.** — WORD “THEREUPON,” in the sentence “thereupon the defendants filed in writing their motion for a new trial,” appearing in the record immediately after the verdict, is to be construed as an adverb of time, and means without delay or lapse of time.

**LANDLORD AND TENANT — ESTOPPEL AGAINST LANDLORD.** — Where a landlord leases the whole of his building to one lessee, with authority to sublet, and informs a tenant of part of the building of the facts, advising and inducing him to obtain a new lease from such lessee, the landlord and his privies under a subsequent lease are estopped to deny the authority of such original lessee to sublet.

**ESTOPPEL AGAINST OWNER.** — Where the owner of property holds out another as having power of disposition or authority over it for any purpose, he is estopped to deny the existence of such power, as against one who has innocently dealt with the party in whom such apparent power is vested.

*Johnson, Martin, and Keeler*, for the plaintiffs in error.

*Rossington, Smith, and Dallas*, for the defendant in error.

**STRANG, C.** Action for damages. The petition alleges that in June, 1886, John Wand was a druggist, with a stock of goods, in possession of the storerooms on lot 218 on Kansas Avenue, Topeka, as the tenant of Allen Sells, owner of the Windsor Hotel building, said storerooms being a part of said building; that at the same time the plaintiffs, Hill Brothers,



as partners, were in possession of the Windsor Hotel under a five-year lease from said Allen Sells; that the plaintiffs represented to the defendant, John Wand, that they also had a lease of the storerooms occupied by him, covering the period of the last three years of their hotel lease, and thus induced said Wand to take a lease of said storerooms of them for the period of three years, at the monthly rental of \$150; that after giving Wand said lease, the plaintiffs sold their furniture, and assigned their lease of said hotel to Passmore and Wiggins; that after Passmore and Wiggins obtained possession of said hotel, they notified the defendant that their predecessors, Hill Brothers, never had any lease from Sells for the storerooms occupied by him, and that he must either surrender the possession of said rooms to them, or pay them a much higher rent; that he saw Mr. Sells, and learned from him that, while he thought he had leased said storeroom to the Hills, he had ascertained that he had only contracted to lease it to them, and had not leased it; and that said Wand, learning, as he believed, that the Hills had no lease of said storerooms, and no authority to lease the same to him, and believing that his lease from them did not protect him, as he alleges it did not, was compelled, rather than to move out, to take a lease from Passmore and Wiggins, and pay a much larger monthly rental, to wit, the sum of \$175 per month, whereby he was damaged in the sum of \$25 per month for three years, or, in the aggregate, \$900. The defendants below answered by a general denial. When the case was reached for trial and the plaintiff had introduced his evidence, the defendants demurred thereto, for the reason that it failed to establish a cause of action, which demurrer was overruled.

The first question to be discussed here is a question of practice raised by the defendant in error, who contends that there is no case here for review; that the case made does not show that the motion for a new trial was filed in the court below within the statutory time, and that, therefore, under the decisions of this court, the case should be dismissed. Whether this contention is correct or not depends upon the construction of the word "thereupon," appearing in connection with the allegation of the filing of the motion for a new trial. The case made recites, that "after hearing the arguments of counsel and being duly instructed by the court, the jury, after due deliberation, returned to the court its general verdict, and its special findings upon particular questions of fact stated by the defend-

ants, which verdict and findings are in the words and figures following, to wit." Then follow the verdict and special answers, immediately at the end of which, and in close connection therewith, the following declaration appears: "Thereupon the defendants filed in writing their motion for a new trial, of which the following is a copy." Then follows a copy of the motion for new trial and the reasons therefor.

By reference to Webster's, Worcester's, and other dictionaries, we find the word "thereupon" defined as follows: "Thereupon: 1. Upon that or this; 2. On account of that; in consequence of that." In Anderson's Dictionary of Law it is thus defined: "Thereupon: Without delay or lapse of time." From these authorities it will be seen that the word "thereupon" is employed to express a cause or condition, or is used as expressive of time. The record in this case shows the different stages of the trial, each succeeding the other in regular order, down to and including the return of the verdict of the jury. It then proceeds as follows: "Thereupon the defendants filed their motion in writing for a new trial." As employed here and in this connection, we do not think the word "thereupon" refers to a cause or condition precedent, but that it is used as an adverb of time, and means, in the language of Anderson's work above referred to, "without delay or lapse of time"; and that, with the balance of the sentence which it introduces, it means that immediately upon the return of the verdict of the jury the defendants filed their motion for a new trial. With this construction upon the word "thereupon," it follows that the motion for new trial was filed in time, and the case is properly here for review.

The second contention of the plaintiffs in error is, that the court erred in overruling their demurrer to the evidence of the plaintiff below. Did the evidence of the plaintiff below establish a *prima facie* case against the defendants in the trial court? If it did not, then the court erred in its ruling; otherwise the ruling of the court was correct. The proper answer to this question must determine whether or not the plaintiff below had such a lease of the storerooms occupied by him in the Windsor Hotel building, from Hill Brothers, as would protect him in such occupancy. If his lease from the Hills was sufficient to protect him in his rights therein stipulated, then he had no cause of action against them under the evidence, notwithstanding the fact that, ignorant of his rights under the law, he was induced by Passmore and Wiggins to take a new

lease of them for the same premises at a higher rental; and the demurrer to the evidence should have been sustained. The Hills had a proper lease of the hotel building, except the store-rooms occupied at the time by Wand, from the owner, Allen Sells, for a period running three years yet from the ensuing 1st of November, 1886. Said lease also contained the following clause: "Said Allen Sells agrees to lease said store room or rooms to said Horace P. Hill upon reasonable notice by said Hill, at a monthly rent of \$125 in advance; provided always, that said Allen Sells can get peaceable possession of the same from the present occupant, and will connect said drug-store with the hotel by a door or other opening."

Wand was in possession of said storeroom as tenant of Allen Sells, the owner, and his term would expire on the first day of November, 1886. In June, 1886, Wand and the Hills had made the connection between the drug-store and hotel spoken of in the clause of the lease from Sells to the Hills, above recited, and were in some trouble about the amount to be paid by Wand to the Hills for the privilege of said opening, he wishing said passage-way kept open to enable him to sell cigars to the guests of the hotel. Pending the discussion of said difficulty and attempts to settle the same by Wand and the Hills, Allen Sells, the owner of all the property, and landlord of both Wand and the Hills, appears and advises Wand to settle the passage-way matter with the Hills. He said to Wand that he (Sells) had leased the storerooms to the Hills from the 1st of November following, and that if he (Wand) did not settle with the Hills, they would put him out at that time. Sells left Wand, and after a short time returned and told him that the Hills would settle the archway matter for \$25 per month, and give him a lease of the storeroom from November 1st at \$150 per month and the free use of the archway, and that he (Sells) would advise Wand to do that. Sells said he had leased to the Hills, and they could sublease to him. Wand concluded to do as Sells advised him, and settled up the archway dispute, and took a lease of the storerooms of the Hills for the remaining three years of their lease of the hotel, to wit, three years from November 1, 1886.

Afterward, some time, the Hills sold out to Passmore and Wiggins, and assigned to them the hotel lease. Some time after Passmore and Wiggins got possession of the hotel, they obtained from Sells a lease of the storerooms occupied by Wand. They then notified Wand to quit and surrender to

them the rooms he occupied, and when Wand objected and informed them of his lease, they told him it was not valid, because the Hills never had a lease of said rooms from Sells, and no authority to rent them to him. Passmore and Wiggins, however, offered to rent the rooms to Wand, but at a much higher rental per month. Wand, believing his lease not good, finally rented of Passmore and Wiggins at a rental of \$25 per month in advance of the amount he was to pay under his lease from the Hills. Would the lease from the Hills to Wand for the storerooms, under all the circumstances under which it was made, have protected him in the possession thereof? We think it would. The lease from the Hills to Wand was a proper lease in writing for the premises occupied and to be occupied by Wand. The Hills actually had in writing, at the least, an agreement on the part of Sells to lease to them the rooms occupied by Wand for a stipulated rental, upon reasonable notice, provided he could get peaceable possession of the same from Wand. The evidence shows that he either had notice or it was waived. The peaceable possession of the premises was surrendered to him by Wand, and the opening between the drug-store and hotel had been made; so that all the conditions upon which Sells was to lease the premises occupied by Wand to the Hills were executed. At this juncture Sells, who has agreed in writing to lease to the Hills, appears and informs Mr. Wand that he has leased to the Hills, and advises, and in the language of Wand, begs, him to take a lease from the Hills, saying they have authority to sublet. In pursuance of Sell's advice and importunities, Wand does take a lease from the Hills, and remains in possession thereunder. After all that had transpired, could Mr. Sells have come forward and demanded and obtained possession of said rooms from Wand during the lifetime of Wand's lease from the Hills, upon the ground that the Hills had no authority to make the lease to Wand? We think not. Mr. Sells would be fully estopped from denying the authority on the part of the Hills to make the lease in question, and such lease would amply protect Mr. Wand in his rights thereunder, as against Mr. Sells. Having told Wand that he had leased the rooms to the Hills, that they had authority to sublet, and thus induced Wand to lease of the Hills, he (Sells) could never be heard to say that the Hills did not have authority to make the lease to him. The law will not tolerate such conduct, and de-

clares whoever indulges in it forever estopped from denying the authority he has affirmed to exist.

“In accordance with this case, it is now a well-established principle, that where the true owner of property, for however short a time, holds out another or allows another to appear as the owner of, or as having full power of disposition over, the property, the same being in the latter's actual possession, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. . . . Such rights do not depend upon the actual title or right or authority of the party with whom they have directly dealt, but are derived from the conduct of the real owner, which precludes him from disputing against them the existence of the title or right or power which he caused or allowed to appear to be vested in the party making the sale”: Bigelow on Estoppel, 560.

“Where the owner of property confers upon another an apparent title to or power of disposition over it, he is estopped from asserting his title as against an innocent third party, who has dealt with the apparent owner in reference thereto without knowledge of the claims of the true owner. The rights of such third party do not depend upon the actual title or authority of the one with whom he dealt, but upon the act of the owner, which precludes him from disputing the title or authority he has apparently conferred”: *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325; 7 Am. Rep. 841.

These two authorities, which are so near alike, the one from Bigelow on Estoppel, and the other from a decided case in the New York courts, seem to be in point in this case. These authorities hold, that where the owner of property holds out another as having power of disposition or authority over the same for any purpose, he is estopped from denying the existence of such power of disposition or authority over the property, as against the rights of a person who has innocently dealt with him who is thus given such apparent power of disposition or authority. Allen Sells not only told Wand that he had leased the storerooms to the Hills, but told him they had power to sublet, and “begged” Wand to take a lease of the Hills. In this he not only held the Hills out to Wand as having full power of disposition of the rooms by lease, but advised Wand to take a lease from the Hills under the power of disposition he declared they possessed. Wand dealt with the Hills, believing, from the representations of Sells, that they had full power of disposition over the rooms he desired. Can

it be that Sells could afterwards be heard to deny, as against Wand, that the Hills had full power of disposition over the storerooms leased by him from them? We think not. If he could not deny the existence of such power in the Hills by word, could he, by any act of his, destroy, set aside, or annul the apparent power of disposition over said rooms existing in the Hills? Again we say no. "The rights of such third party do not depend upon the actual authority of the one with whom he dealt, but upon the act of the owner, which precludes him from disputing the authority he has apparently conferred": *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325; 7 Am. Rep. 341. So in this case, the rights of Wand, under the lease from the Hills, did not depend upon any actual authority or power of disposition over the rooms leased in the Hills, but upon the apparent power of disposition thereof conferred upon them by Sells, holding them out to Wand as rightfully possessed of such power. That is, it mattered not, so far as Wand's rights under his lease from the Hills were concerned, whether the Hills had a lease from Sells or not; after Sells had represented them to Wand as having one, with power to sublet, he could not deny that they did have one containing such authority. This being true, a subsequent lease from Sells to Passmore and Wiggins conferred upon them no greater rights as against Wand than Sells had, and no more power to deny the authority of the Hills to make the lease to Wand than Sells himself possessed. The Hills did not at any time dispute their power to lease to Wand, but all the time affirmed that their lease to Wand was a good one, and that it fully protected him in the enjoyment of his rights stipulated therein. As neither Sells nor Passmore and Wiggins could dispute the validity of Wand's lease from the Hills, we take it that such lease would have protected him in the enjoyment of the rights in said lease stipulated against all the world. *Anderson v. Armstead*, 69 Ill. 452, holds with the two authorities above cited, and says the third party will be protected.

"If one whose name is signed by another to a deed so far acknowledges the deed as to induce third persons to act on it as his, he may, without evidence in writing of an estoppel, be held precluded from subsequently denying the deed": *Goodell v. Bates*, 14 R. I. 65.

"Where the owner or the person having an interest in property represents another as the owner, or permits him to appear as such, or as having authority over it, he will be estopped to



deny such ownership or authority against persons who, relying on his representations or silence, have purchased or acquired interests in the property": 7 Am. & Eng. Ency. of Law, 18.

"Privies are bound by or may take advantage of an estoppel in pais": *East Ala. R'y Co. v. Tennessee etc. R. R. Co.*, 78 Ala. 274; *Karnes v. Wingate*, 94 Ind. 594; *Timon v. Whitehead*, 58 Tex. 290; *Wood v. Seely*, 32 N. Y. 105.

"Where a person is estopped, his creditors attaching the property in question are estopped also": *Parker v. Crittenden*, 37 Conn. 148.

A point is made that the special findings of fact are not sustained by the evidence, but that the jury in making them ignored all the evidence in the case relating to the questions to which their findings are answers. The findings are not only not supported by any evidence, but are directly against all the evidence relating thereto. With our view of the law of this case, this is all we care to say about the findings. We think the lease from the Hills to Wand protected Wand in the enjoyment of all the rights he stipulated for therein. It follows, then, that if Wand, having a lease that would protect him in his rights, allowed Passmore and Wiggins, or any one else except the Hills, to persuade him to take a subsequent lease at a higher rental, that the Hills were not to blame, and having done so and paid a higher rental, he had no cause of action against the Hills therefor, and the demurrer to the evidence should have been sustained.

It is recommended that the judgment of the district court be reversed, and the case remanded for new trial.

By the COURT. It is so ordered.

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**ESTOPPEL AGAINST OWNER.** — Where an owner of property clothes another with apparent authority to dispose of it, and he does dispose of it to innocent purchasers, the owner will be estopped from disputing as against them the power which he allowed to appear vested in the party making the sale: *Velston v. Lewis*, 15 Or. 539; 3 Am. St. Rep. 185, and note 201; *Guffey v. O'Reilly*, 38 Mo. 418; 57 Am. Rep. 424, and extended note. Where a party induces another to believe in the existence of a certain state of affairs, and such party alters his condition, the first party is estopped from alleging the contrary against the second party: *Chouteau v. Goddln*, 39 Mo. 229; 90 Am. Dec. 462, and note; *Oasler v. Byers*, 129 Ill. 657; *Stayton v. Graham*, 139 Pa. St. 1. A mortgagor who induces a third party to receive an absolute deed from the mortgagee is estopped to afterward deny the mortgagee's right to make such a conveyance. If one is induced to purchase land by the conduct of another leading him to believe that he is getting a good title, the latter is estopped to set up against him any title in himself: *Trustees v. Smith*, 118 N. Y. 634.



**OLSON v. NUNNALLY.**

[47 KANSAS, 391.]

**EXECUTION BASED ON VOID JUSTICE'S JUDGMENT — COLLATERAL ATTACK —**

**INJUNCTION.** — A justice's judgment, in a case in which he sets it aside and orders a new trial, has no legal existence from the time it is thus vacated, and if nothing is done at the time that the case is set for a new trial, he loses all jurisdiction over it, and cannot revive the judgment by subsequently vacating his previous order setting it aside. Hence an execution afterwards issued under such judgment is void, and it may be attacked either directly or collaterally, or its enforcement may be enjoined.

**EXECUTION ISSUED UNDER VOID JUDGMENT** is itself absolutely void, and may be attacked collaterally as well as directly, and its enforcement may be restrained by injunction.

**EXECUTION ISSUED UNDER VOID JUDGMENT — REDELIVERY BOND — ESTOPPEL — COLLATERAL ATTACK.** — Where a judgment upon which an execution is issued and levied is void, the party giving a redelivery bond, and thereby obtaining the right to retain possession of the property levied upon, does not thereby estop himself from afterwards asserting, either directly or collaterally, that the judgment and execution are absolutely void.

*J. H. Mechem*, for the plaintiff in error.

*T. S. Kirkpatrick*, for the defendants in error.

**VALENTINE, J.** This was an action brought in the district court of Jewell County, on December 13, 1887, by Peter Olson against N. Lindgrove and A. G. Nunnally, to perpetually enjoin the defendants from making a sale of certain personal property belonging to Olson, and levied on by the defendant Nunnally as constable of Center township, in said county, under an execution issued by J. W. McRoberts, a justice of the peace of said township, upon a supposed judgment in favor of Lindgrove, as the judgment creditor, and against Olson, as the judgment debtor. The plaintiff, Olson, in his petition in the district court, sets forth and alleges that the judgment upon which the execution was issued was rendered on April 30, 1887, and he attaches a certified transcript of the judgment and the proceedings of the justice of the peace to his petition, and makes them a part thereof. This transcript shows that the trial before the justice was had on April 28, 1887, and then follow these words: "After hearing arguments of counsel, and taking the matter under consideration until April 30, 1887"; and then follows the justice's judgment, which is entered without any further date being given. Olson further alleges in his petition, and shows by the transcript,

that on May 4, 1887, such judgment was set aside and vacated, and a new trial granted, upon a motion made by himself for that purpose, upon the ground of newly discovered evidence, and the new trial was set for May 16, 1887. But it is also alleged that on that day the parties appeared, but the justice of the peace was absent from his office and from the township, and nothing further was done in the case. The transcript also shows that on November 8, 1887, the justice of the peace attempted to set aside and vacate his previous order setting aside and vacating the aforesaid judgment and granting a new trial, for the reason that the aforesaid motion of Olson's to vacate the judgment and for a new trial was not "in writing as agreed upon." Upon this subject, Olson alleges in his petition that it was agreed by the parties at the time that the motion might be made orally. Whether Olson or his counsel was present or not, or had any notice when this last order of the justice was made attempting to set aside his former order vacating the judgment and granting a new trial, the transcript is silent. Other allegations are contained in the petition, not necessary to be stated for the purposes of any question now presented to this court. This petition was duly verified by affidavit. The defendants answered, setting up the aforesaid judgment, execution, and levy, and also that the defendant gave a redelivery bond, on account of which he was permitted to retain the possession of the property levied on. The defendants also allege in their answer that the aforesaid judgment was rendered on April 28, 1887, and that Olson did not make any motion for a new trial within five days thereafter; and they attach a certified transcript of the judgment and proceedings of the justice of the peace to their answer, and make the same a part thereof. This transcript shows precisely the same as the one attached to the plaintiff's petition, except that it does not contain the words, "after hearing arguments of counsel, and taking the matter under consideration until April 30, 1887." The plaintiff replied to this answer by filing a general denial. Neither the answer nor the reply was verified by affidavit. At the June term of the district court in 1888, the defendants made and presented a motion for judgment upon the pleadings, which motion was sustained, and judgment was rendered in favor of the defendants and against the plaintiff for costs; and the plaintiff, as plaintiff in error, brings the case to this court for review.

It would seem to us that the judgment of the district court

is erroneous and must be reversed. For the purposes of the case, it must be assumed either that the judgment of the justice of the peace was rendered on April 30, 1887, or that there was an issue of fact presented by the pleadings of the parties as to whether it was rendered on that day or on April 28, 1887; and as the plaintiff Olson in his petition alleged, and his transcript showed, that the judgment was rendered on April 30, 1887, he certainly had a right, either to have this allegation to be considered as true, or the right to prove the same by evidence; provided, of course, that the same shall be considered as material in the case and as controverted by the defendants. We shall therefore assume, for the purposes of this case, that the judgment was rendered on April 30, 1887. We shall also assume, for the purposes of this case, that in any case a motion to vacate or set aside a decision or verdict rendered in a justice's court and for a new trial must be made within five days after the decision or verdict is rendered: Justices' Code, sec. 110; and that the motion should be in writing, but that the parties and the justice may waive the writing, and permit the motion to be made orally; and with these assumptions, the following questions arise: Was the judgment of the justice of the peace a valid and subsisting judgment at the time when the execution in question in this case was levied on Olson's property? And did he, by giving the redelivery bond, estop himself from questioning its validity? The judgment, if rendered on April 30, 1887, as alleged by the plaintiff and shown by his transcript, was certainly vacated and set aside on May 4, 1887, and therefore at that time it ceased to have any legal existence. The action, however, was still pending before the justice of the peace, and the case was set for a second trial on May 16, 1887; but on that day the justice of the peace was absent from his office and from the township, and nothing was done in the case, and therefore, under the authorities, the justice lost all jurisdiction of the case: *Martin v. Fales*, 18 Me. 23; 36 Am. Dec. 693; *Flint v. Gault*, 15 Hun, 213; *Lynsky v. Pendegrast*, 2 E. D. Smith, 43; *Downer v. Hollister*, 14 N. H. 122; 40 Am. Dec. 175; 12 Am. & Eng. Ency. of Law, 402, and cases there cited. And the subsequent order of the justice of the peace attempting to vacate his former order vacating the judgment and granting a new trial certainly could not revive or resuscitate the former defunct judgment. There being, then, no valid judgment in existence to uphold the execution when the same was levied upon Olson's property, the execu-

tion was itself absolutely void, and it may be attacked collaterally as well as directly, and its enforcement be restrained by injunction: 1 Freeman on Executions, sec. 20; 12 Am. & Eng. Ency. of Law, 400, 401; *Missouri Pac. R'y Co. v. Reid*, 34 Kan. 410, 413.

It is further claimed by the defendants, Lindgrove and Nunnally, that the plaintiff, Olson, who was defendant in the execution, and whose property was levied on, is estopped from claiming that the judgment of the justice of the peace is void, for the reason that he gave a redelivery or forthcoming bond, and was thereby permitted to retain the possession of the property levied on; and several authorities are cited as authority for this claim, among which are certain decisions rendered by this court: *Sponenbarger v. Lemert*, 23 Kan. 55; *Hartun v. Sizer*, 23 Kan. 810; *Wolf v. Hahn*, 28 Kan. 588; *Cass v. Steele*, 34 Kan. 90. These cases have no application to the present case. These cases have nothing to do with void judgments, void executions, or void levies, but go only to this extent: where property of the defendant is levied upon by an officer under judicial process, and the defendant, or any one for him, afterward gives a redelivery or forthcoming bond, the party giving such bond, or procuring it to be given, is estopped from afterward asserting title to the property in any person other than the defendant in the process. But where a judgment upon which an execution is issued and levied is void, which renders all the subsequent proceedings void, the party giving the redelivery bond, and thereby obtaining the right to retain the possession of the property levied on, does not thereby estop himself from afterward asserting, either directly or collaterally, that the judgment and all things depending thereon are utterly and absolutely null and void: 2 Freeman on Executions, sec. 264; *Earl v. Camp*, 16 Wend. 562; *Perry v. Williams*, 39 Wis. 339; *Buckingham v. Bailey*, 4 Smedes & M. 538; *Ex parte Cheatham*, 6 Ark. 531; *Newburg v. Munshower*, 29 Ohio St. 617; 23 Am. Rep. 769; *Van Cleave v. Haworth*, 5 Ala. 188; *Page v. Coleman*, 9 Port. 275. We do not hold in this case that a party after giving a redelivery or forthcoming bond may then interpose objections because of any mere irregularities in any of the prior proceedings; but we simply hold that a party giving such a bond is not estopped from afterward asserting that all the prior proceedings are absolutely and utterly void.

The judgment of the court below will be reversed, and the cause remanded for a new trial.

**EXECUTION — ERROR OF VOID JUDGMENT.** — An execution garnishment must be supported by a valid judgment: *White v. Feets Lumber etc. Co.*, 29 W. Va. 385; 6 Am. St. Rep. 650. A valid judgment is necessary to support a sale under execution: *Lowry v. Erwin*, 6 Rob. (La.) 192; 39 Am. Dec. 556; *Walker v. McKnight*, 15 B. Mon. 467; 61 Am. Dec. 190.

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## JACKSON v. LINNINGTON.

[47 KANSAS, 332.]

**MALICIOUS PROSECUTION — PROBABLE CAUSE — ADVICE OF ATTORNEY.** —

Where there is probable cause for commencing a prosecution for malicious trespass, and the prosecutor, acting upon the advice of attorneys, and believing there is probable cause, in good faith and without malice causes the arrest and prosecution, he is not liable to the defendant for malicious prosecution, notwithstanding one of his purposes in causing the arrest was to prevent the construction of a building on his land.

**MALICIOUS PROSECUTION — PROBABLE CAUSE — ENFORCEMENT OF CIVIL RIGHT.** — An arrest and prosecution instituted merely to enforce a civil right is without probable cause, and renders the prosecutor liable for malicious prosecution.

**TRIAL — FINDINGS — VERDICT — INTERPRETATION.** — Where the findings will fairly admit of an interpretation which will make them harmonious with one another and with the general verdict, that interpretation should be given, rather than one which will overturn and destroy both the findings and the verdict.

**ACTION for malicious prosecution.** Linnington caused the arrest and prosecution of Jackson upon a charge of malicious trespass, and after the acquittal of the latter, he instituted this action against Linnington. The jury returned a general verdict for defendant, and also the following findings of fact: "Q. Was the object of the defendant in prosecuting the plaintiff to prevent the plaintiff from building a building on said lot 13? A. Yes; and to prevent any one getting possession before a pending contract was consummated. Q. At the time of said prosecution, on December 13, 1887, did the defendant have reasonable grounds to believe that the plaintiff had committed the offense charged? A. Yes. Q. Did the defendant act upon the advice of his attorneys, after a full consultation and statement of the facts, in commencing said prosecution? A. Yes. Q. Was there probable cause for commencing said prosecution? A. Yes. Q. Was said prosecution malicious on part of defendant, or did he act with malice toward plaintiff, bringing said action? A. No. Q. Did plaintiff suffer any damage from imprisonment? A. No. Q. If the last question is answered in the affirmative, state how much. A.

Not any. Q. How much time did the plaintiff lose from his business by reason of his arrest, if any? A. One day. Q. How much, if anything, did plaintiff pay out in attorney's fees for his separate defense in said action? A. Twenty dollars. Q. If question No. — is answered in the affirmative, how much do you allow for time, if anything? A. Not anything."

*W. D. Webb and Grant Harrington, for the plaintiff in error.*

*W. I. Stuart and S. L. Ryan, for the defendant in error.*

JOHNSTON, J. The evidence in the case is not preserved, but the record contains a short statement of what the evidence offered by the parties tended to show, and that is sufficient to raise the questions which the plaintiff desires to present upon the testimony and findings. Complaint is first made of the refusal of instructions requested, as well as the giving of instructions which were objected to. While a general complaint is made, the plaintiff fails to indicate what the specific objections are, or to point out wherein the rulings are deemed by him to be erroneous.

The charge given appears to embody all material and correct instructions that were requested, and to fairly present the case to the jury. One request which raises the same question as is raised upon the findings was, that if the jury found that the purpose of the defendant in bringing the prosecution was to prevent the plaintiff from building a house, then such a prosecution was without probable cause. This instruction was modified by the court. After defining the offense of malicious trespass, and what facts would be sufficient to constitute probable cause for the institution of a prosecution therefor, the court charged that "if said prosecution was instituted merely to prevent the plaintiff herein from erecting a building on the lot in controversy, such fact would not constitute probable cause for commencing the prosecution." This was a proper modification. If the sole purpose of the prosecution was to prevent the erection of a building, it would not have been justified. The construction of the house, however, appears to have involved the digging and preparation of a foundation, and hence the defendant may have desired not only to prevent the erection of a building, but also intended to prosecute and prevent the offense which had been committed, and the further commission of the same. Evidence was given tending to show that the defendant notified the plaintiff that the lot upon which he

was digging, and from which he was removing clay and dirt, belonged to him, and warned him against further trespassing there; but notwithstanding this warning, he refused to quit work, and further continued to trespass upon the defendant's property. There was also testimony that the defendant, before he commenced the prosecution, counseled with attorneys, and after presenting them with a full statement of all the facts, they advised him that the plaintiff was guilty of the offense, and that the prosecution could be maintained. Acting on their advice, he, in good faith and without malice, believing the action could be maintained, and that there was probable cause for making the charge, began the prosecution. And if there was probable cause for commencing the prosecution, and he, acting upon the advice of attorneys, in good faith believed there was probable cause, and if in good faith and without malice he caused the arrest and prosecution of the defendant, the fact that he may also have desired to prevent the construction of the building upon the lot would not entitle the plaintiff to recover. On the other hand, if his sole purpose was to prevent the erection of a building, or the mere enforcement of a civil right, then the arrest and prosecution would be without probable cause, for which the defendant would be liable.

In one of the findings returned by the jury, it is stated that the object of the defendant was to prevent the plaintiff from erecting a building on his land; and the plaintiff contends that this finding entitled the plaintiff to a recovery. The finding, however, when construed in connection with the others returned by the jury, shows that this was not the only object of the defendant in beginning the prosecution, but that he acted in good faith and without malice in the institution of the prosecution. It is found that he had reasonable grounds to believe that the plaintiff had committed the offense charged; that he acted upon the advice of his attorneys, after a full consultation and a statement of all the material facts, and that he relied upon the advice of the attorneys in bringing the action; and also that there was probable cause for the commencement of the prosecution. If the findings will fairly admit of an interpretation which will make them harmonious with each other and with the general verdict, that interpretation should be given, rather than one which will overturn and destroy the findings and verdict: *St. Louis etc. R'y Co. v. Rits*, 88 Kan. 404; *Union Pac. R'y Co. v. Fray*, 43 Kan. 750. The



findings may fairly be construed to show that the defendant instituted the prosecution in good faith, to punish the plaintiff for the offense charged against him. Although he desired to prevent the building of a house, he also desired and intended to procure the punishment of a public offense, and to prevent the further commission of the same. The digging up of the clay and dirt, and the removal of the same from the defendant's land without consent or right, constituted probable cause, and it also constituted a part of the construction of the house. We think the findings may be fairly harmonized with each other and with the general verdict.

The judgment of the district court will be affirmed.

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**MALICIOUS PROSECUTION — RELYING ON ADVICE OF COUNSEL AS PROBABLE CAUSE.** — Where defendant, in an action for malicious prosecution, has laid all the facts before counsel, and has acted in good faith upon the advice given, this exonerates him from liability: *Adams v. Bicknell*, 126 Ind. 210; 22 Am. St. Rep. 576, and note; *Paddock v. Watts*, 116 Ind. 146; 9 Am. St. Rep. 332, and note; note to *Boeger v. Langenberg*, 10 Am. St. Rep. 327; *Smith v. Walter*, 125 Pa. St. 453. For monographic note on the subject of malicious prosecution of charges of crime, see *Ross v. Hixon*, 26 Am. St. Rep. pp. 127-164.

**MALICIOUS PROSECUTION — ARREST IN CIVIL ACTION.** — An action for malicious prosecution will not lie for prosecuting a civil suit, unless the defendant has upon such prosecution been arrested without cause, or made to suffer some other special grievance: *Potts v. Inlay*, 4 N. J. L., 330; 7 Am. Dec. 603; note to *Williams v. Hunter*, 14 Am. Dec. 600; extended note to *McCardle v. McGinley*, 44 Am. Rep. 346.

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## COX v. GRUBB.

[47 KANSAS, 435.]

**PARTNERSHIP — VOID CONTRACT BY SURVIVING PARTNER — PUBLIC POLICY.**

— Where a member of a partnership dies leaving minor children, an agreement entered into between his surviving partner, his widow, and his individual creditors, that the surviving partner shall retain the partnership property without administration, and shall pay a *pro rata* share of the individual indebtedness of his deceased partner, is void as against public policy, the policy of the probate law, and the interests of such minor children; and a promise based upon such agreement cannot be enforced.

*J. D. McCleverty and O. A. Cheney*, for the plaintiff in error.

*A. A. Harris and Henry E. Harris*, for the defendant in error.

SIMPSON, C. The material facts are, that Cox and Ernst were partners, doing a small butcher business in the town of Fulton, in Bourbon County. January 6, 1888, Ernst died intestate, leaving a widow and some minor children. At the death of Ernst the partnership owed no debts, and had on hand tools and stock of the value of several hundred dollars. Individually Ernst was indebted to several creditors, and owed Grubb about \$207, and the only means of payment was the intestate's interest in the partnership property. Shortly after the death of Ernst, an attempt was made to settle up the affairs of his estate without having administration thereon, and for that purpose it was proposed that the said Cox retain the Ernst share of the partnership property, and pay a *pro rata* share to each of the creditors, the said Grubb being one of them; the value of the assets belonging to the estate of the said Ernst being found to amount to about fifty cents upon the dollar of his debts. To this the widow of Ernst, a partial meeting of the creditors, and the said Cox, all assented. The amount due Grubb by Ernst was \$206.60, and this suit was for such *pro rata* amount, or one half. The defendant, Cox, made the promise to pay this *pro rata* amount, believing that if all the creditors assented it could be legally done; but finding there were other creditors, he refused to do so, and did not pay Grubb. After a while an administrator was appointed, who took possession of the assets of the estate of Ernst, and disposed of the same by selling to defendant, Cox, he accounting for all of the property, including some after-accruing profits, with the administrator. The plaintiff below, Grubb, had judgment, and Cox brings the case here for review, a new trial having been denied.

The questions are: Was the promise of Cox to pay Grubb based upon a valid consideration? and if so, was it binding, when not in writing, it being conceded that it was in parol only? Another serious question is: Can such a contract be upheld unless the minor heirs are represented, and unless such a disposition of the estate of the deceased person is authorized or ratified by the probate court? The case of *Ravenscraft v. Pratt*, 22 Kan. 20, holds that a sale made by the widow of a deceased partner, who had been appointed administratrix of her husband's estate, to the surviving partner, of all the deceased partner's interest in the partnership, consisting of tanning and the hide and leather business, was illegal and void. In this case the deceased partner left a widow and four chil-

dren. In the case of *Specht v. Collins*, 81 Tex. 213, it is held that a contract by the husband to convey his deceased wife's land, "as soon as administration is had upon said estate," is void as against public policy, since the husband can neither bind the estate nor the course of administration. The record in this Texas case does not disclose whether there were other heirs, or whether there were debts against the estate of the deceased wife.

In the *Ravenscraft* case the widow was administratrix, and the deceased partner left other heirs. In the Texas case, the surviving husband was the sole heir, but was not the administrator when he made the contract for sale. In this case, the deceased partner left a widow and minor heirs, but at the time this promise was made there was no administration. The cases cited go upon the theory that such a contract is against public policy, for the reasons that the statutes provide a tribunal whose duty it is to supervise the settlement of the estates of all deceased persons, and whose special duty it is to protect the interests of minor children and heirs. No contract can be made respecting the assets of a deceased person's estate, except by the authority and with the approval of the probate court, and only then to the extent authorized or permitted by the laws of the state. In the absence of administration, no heir can make a contract that will be binding. No stipulation could be entered into by the widow that would bind the minor heirs in any matter respecting the settlement of the estate or its property or its debts. The law fixes the manner of administration; it imposes certain restrictions upon the sale of the assets of an estate, and even when the sale is authorized by law, and ordered by the probate court, the sale and its terms and its methods are still subject to the approval of the court ordering it. No person interested in the estate can, by contract, assent, or silence, create other methods of selling the assets of the estate than those prescribed by the law. To permit this in any one instance would withdraw all the safeguards and beneficent restrictions that the law imposes for the protection of the interests of minor and non-resident heirs. The widow could not make any contract that would bind the minor heirs; she could make no contract pledging the course of the administration of the law respecting the settlement of the estate of a deceased person. Public policy, the policy of the probate law, and the interests of minor children in the estates of their deceased parents, all forbid such contracts as the one

made in this case. This particular contract was illegal, and the promise of Grubb, being a part and parcel of it, was illegal and void.

We recommend that the judgment be reversed, and the cause remanded for further proceedings.

By the COURT. It is so ordered.

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**CONTRACTS — CONTROL OF DECEDENT'S ESTATES BY.** — Executory contracts made to control the distribution of a man's estate after his death are void; *Needles v. Needles*, 7 Ohio St. 432; 70 Am. Dec. 85, and note. For a discussion of the validity of contracts ousting courts of jurisdiction, see extended notes to *Utter v. Travelers Ins. Co.*, 8 Am. St. Rep. 922; *Western U. Tel. Co. v. Dickinson*, 13 Am. Rep. 297.

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## SHELLABARGER v. MOTTIN.

[47 KANSAS, 451.]

**FRAUDULENT CONVEYANCES — CHATTEL MORTGAGE TO SECURE FUTURE LEGAL SERVICES.** — A chattel mortgage executed by an insolvent debtor, transferring or conveying his property to an attorney, or to some one for the benefit of the attorney, for future legal services to be rendered in whatever litigation the debtor might thereafter be engaged, is fraudulent and void as to the debtor's creditors, and its execution is ground for the issuance of attachments against him.

*Jetmore and Jetmore*, for the plaintiffs in error.

*Theodore Laing*, for the defendants in error.

HORTON, C. J. From December 8, 1887, to March 23, 1889, F. J. Mottin and Ferd. Mottin, partners as Mottin Brothers, were engaged in the general merchandise business at Clyde, in Cloud County, in this state. At the time of commencing business the Mottin Brothers were worth from fifteen thousand to twenty-one thousand dollars. About midnight of Friday, March 22, 1889, being insolvent, they made a general assignment to C. W. Van De Mark. The assignment was dated March 23, 1889. It included their stock of goods, etc., furniture, fixtures, real estate, and equities of both partners, not exempt by law. The sworn schedule of liabilities showed a firm or partnership indebtedness of \$12,524.94. At the time, F. J. Mottin had debts secured by mortgages upon his individual estate of \$6,884. On March 21, 1889, they executed to the Van De Mark brothers a chattel mortgage of \$584.70 upon their stock of goods. On March 22, 1889, they also gave

another chattel mortgage for five hundred dollars to the Van De Mark Brothers, covering their entire stock. This was given to secure a note for attorney's fees. On April 8 and 9, 1889, various creditors of the Mottin Brothers commenced actions against them for large sums of money alleged to be due, and attachments were also issued in all of these actions against the property of the defendants. Their stock, furniture, fixtures, etc., were attached, and appraised at \$9,991.51. All of the foregoing cases involve the same questions, and therefore are considered together.

The affidavits for attachments alleged, among other things, that "said defendants, F. J. Mottin and Ferd. Mottin, partners as Mottin Brothers, were about to assign, remove, and dispose of their property, or a part thereof, with the intent to defraud, hinder, and delay their creditors, and had assigned, removed, and disposed of their property, or a part thereof, with the intent to defraud, hinder, and delay their creditors, and fraudulently contracted the debt and incurred the liability and obligation for which the actions were brought."

The Mottin Brothers filed their motion to vacate and dismiss the attachment proceedings, principally for the reason that the grounds for the attachments alleged in the affidavits were not true. The motion to vacate and dismiss the attachment proceedings was heard at the April term of the court for 1889, and after hearing the evidence and arguments in the cases, the motion was sustained, and all of the attachments were vacated and dismissed. The plaintiffs below excepted, and complain of the rulings of the court below.

Various errors are alleged, but we need refer to one only. The chattel mortgage dated March 22, 1889, for five hundred dollars, was not executed until the Mottin Brothers had determined to make an assignment of their property, and was executed at about the same time. The Van De Mark Brothers agreed to secure Theodore Laing as the attorney for the Mottin Brothers, and they agreed to become responsible to him for his advice, services, etc., as the attorney for them. Ferd. Mottin stated, among other things, as follows: "That Laing was employed by the Van De Mark Brothers as attorney for him and his brother; that he thought he would need legal advice before he got through the assignment."

C. W. Van De Mark testified as follows:—

"Q. For what was the note and mortgage of five hundred dollars given by Mottin Brothers to Van De Mark Brothers?

A. Well, I can explain the whole thing. I don't like to answer in any other way.

"Q. Go on. A. Mottin Brothers came to me and spoke about their difficulties, — bills coming due and trade being slack; and they did n't see how they were going to meet their bills; did n't see what they were going to do, and thought they would probably have trouble with some of their creditors when their bills came due, and was consulting me frequently about it. I told them that I did n't feel competent to give them advice about it; that they had better see some attorney that could advise them better than I could in the matter, and they said they wasn't acquainted with any, and I mentioned the names of several parties in Concordia, attorneys, and I mentioned Mr. Laing's name, and they wanted I should go and see Mr. Laing for them, and employ him as counsel in these matters, or in any other matters that might come up. I went to Concordia and saw Mr. Laing and told him what they wanted, and told him about their condition so far as I knew that they were in; that they had n't got any money at that time. Mr. Laing told me that if Van De Mark Brothers would guarantee the fee it would be all right; told me how much he would want as their attorney in any matters that might come up in relation to their business.

"Q. What sum did he name? A. Five hundred dollars. I then went back and told Mr. Mottin what Mr. Laing had said, and that I would guarantee this, providing that they would give Van De Mark Brothers a mortgage for security, but that we would n't guarantee it without some security, and the note and mortgage were given for that purpose.

"Q. Did you notify Mr. Laing of the result, and let him know that he was employed under those circumstances? A. I did."

Theodore Laing testified that "the fee was taken in full payment of all their services to Mottin Brothers in all of the business they had, and anything that might come up in which they were affected." It therefore clearly appears from the evidence that the mortgage of five hundred dollars, which was given for attorney's fee, was partly for future services; that is, the mortgage was for services part of which, and most of which according to the evidence, were to be rendered in the future. Therefore, while the Mottin Brothers were in an insolvent condition, they created, or attempted to create, a new debt for something to be performed in the future, and tried to pay it

with property which should have been devoted to the payment of their debts then existing. This mortgage, therefore, cannot be sustained, and the making of this mortgage furnished ground for the issuance of the attachments. It would be a fraud upon creditors to permit an insolvent debtor to place his property beyond their reach by transferring or conveying it to an attorney, or to some one for the benefit of the attorney, for future legal services, to be rendered in whatever litigation the debtor might thereafter be engaged: *Winfield Nat. Bank v. Croco*, 46 Kan. 629; *Crain v. Gould*, 46 Ill. 294; *Hill v. Agnew*, 12 Fed. Rep. 280; *Nichols v. McEwen*, 17 N. Y. 22. The mortgagors and the mortgagees were fully acquainted with the purpose of the mortgage, and were involved, as well as the attorney, in the scheme to contract for future legal services and to transfer sufficient property from the Mottin Brothers, just about the time of the making of the assignment, to pay for such future services. There were no innocent parties in this transaction. The assignee, C. W. Van De Mark, did not join in the motion to vacate the attachments, or ask for the discharge of the stock, etc., from the attachments; therefore, all that is before us for decision is the error of the court in vacating the attachments against the Mottin Brothers. The orders vacating and setting aside the attachments in all of the above cases will be reversed, and the cases will be remanded, with direction to the district court to reinstate the cases, and to overrule the several motions to vacate and dismiss.

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**FRAUDULENT CONVEYANCES — MORTGAGES TO SECURE FUTURE ADVANCES.** — Whether a mortgage to secure future advances is fraudulent depends upon the attending circumstances: *Badlam v. Tucker*, 1 Pick. 389; 11 Am. Dec. 202, and note. See note to *Pettibone v. Griswold*, 10 Am. Dec. 108, 109, for a discussion of the validity of mortgages to secure future advances.

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## **LINN COUNTY BANK v. HOPKINS.**

[47 KANSAS, 560.]

**HOMESTEAD — TRACTS OF LAND WHICH CORNER.** — A homestead must consist of one body of land, and where the claimant owns two tracts within the homestead limit, but which touch only at a common corner, he cannot claim them both as exempt, and is entitled to a homestead only in the tract on which he resides.

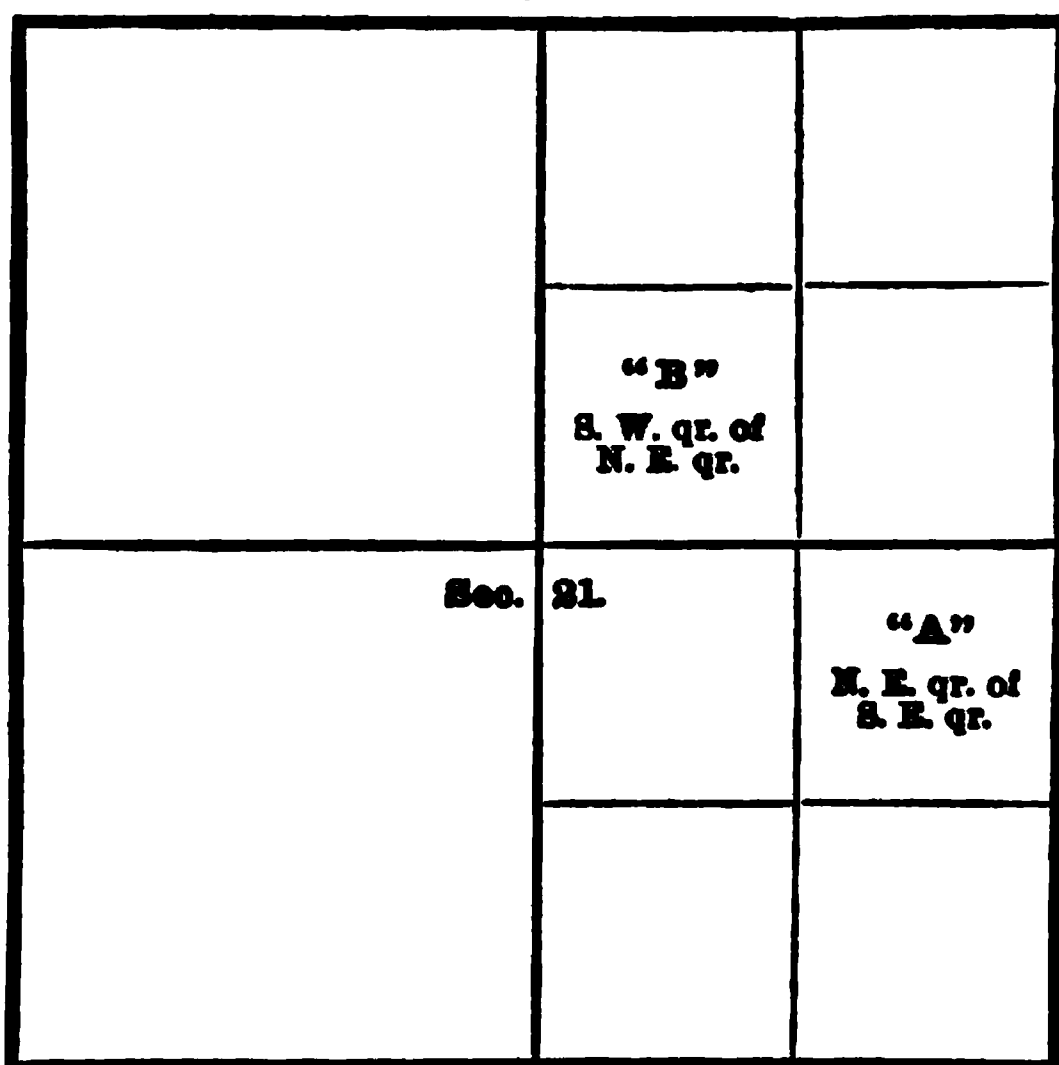
*James D. Snoddy*, for the plaintiff in error.

*J. V. Donaldson*, for the defendant in error.



**GREEN, C.** The Linn County Bank sued A. T. Hopkins upon three promissory notes, and at the same time caused an attachment to be levied upon the northeast quarter of the southeast quarter and the southwest quarter of the northeast quarter of section 21, in township 19, of range 24 east. A motion was made to discharge the attachment, on the ground that the eighty acres was exempt from forced sale for the reason that it was a homestead. The motion was sustained. The question, as stated by counsel for defendant in error, is, whether all of the real estate attached at the instance of the plaintiff was exempt as the homestead of the defendant. The decision of that question settles the controversy in this case. The two tracts of land "cornered" upon each other, as will appear from the following diagram:—

T. 19, R. 24.



The defendant had occupied the tract marked "A" as a homestead, but his home had been burned. We think, however, the evidence upon the motion to discharge the attachment established the fact that he intended to rebuild it, and that this tract was clearly exempt. He had never resided upon the other subdivision. Does the constitution exempt two tracts of land as a homestead which corner? It has been settled by this court that a homestead must consist of only one tract of land: *Randal v. Elder*, 12 Kan. 257, and authorities there cited. The language of the constitution is, that "a

homestead to the extent of 160 acres of farming land, or of one acre within the limits of an incorporated town or city, occupied as a residence by the family of the owner, shall be exempt from forced sale," etc.: Const., art. 15, sec. 9. A homestead is defined to be a person's dwelling-place, with that part of his landed property which is about and contiguous to it. Contiguous means touching sides, adjoining, adjacent. Two tracts of land touching only at one point are not contiguous. In the case of *Kresin v. Mau*, 15 Minn. 119, it was said: "Two tracts of land mutually touching only at a common corner — a mere point — cannot, according to any ordinary or authorized use of language, be spoken of as constituting one body or tract of land." The same construction has been placed upon acts of Congress in relation to the entry of public lands: 1 Lester's Land Laws, Reg. and Dec., 360. See also *Hill v. Bacon*, 43 Ill. 477; *Aldrich v. Thurston*, 71 Ill. 324; Thompson on Homestead Exemptions, secs. 120, 145, 147.

The order of the district judge discharging the attachment levied upon the southwest quarter of the northeast quarter of section 21, in township 19, of range 24, should be reversed.

By the COURT. It is so ordered.

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**HOMESTEAD — LAND MUST BE CONTIGUOUS.** — A lot may be included in a declaration of homestead if it adjoins the lot on which the dwelling of the claimants stands, and is used by them as a garden: *Arendt v. Mace*, 76 Cal. 315; 9 Am. St. Rep. 207, and note. In Illinois a homestead cannot include a tract of land a mile from the dwelling and not adjoining it, from which fuel alone was derived for the use of the farm: *Walters v. People*, 18 Ill. 194; 65 Am. Dec. 730, and note. Two contiguous tracts of land, both constituting one farm, may be regarded as a homestead: *Grimes v. Portman*, 99 Mo. 229. Under the constitution of Texas the homestead may exist in lots not contiguous to each other: *Pryor v. Stone*, 19 Tex. 371; 70 Am. Dec. 341, and note.

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## CAKLEY v. SMITH.

[47 KANSAS, 642.]

**JUDGMENTS — MERGER — RES JUDICATA.** — Where an action is brought in one state to subject a debtor's property to the payment of his debts, a creditor who appears therein by cross-petition and obtains a finding of the amount due him upon a note executed by the debtor, but who does not obtain a personal judgment against him, nor receive anything from the sale of the property under the judgment in that suit, is not estopped from bringing an action on such note in another state. It is not merged in such judgment.

**JUDGMENTS — MERGER — RES JUDICATA.** — A cause of action is merged in a judgment only when such judgment was rendered upon the identical cause of action between the same parties or their privies, and after the plaintiff therein had a full and complete opportunity to recover his whole demand.

*M. A. Thompson*, for the plaintiff in error.

*J. W. Brinckerhoff*, for the defendant in error.

**GREEN, C.** Samuel J. Smith sued William Cackley in the district court of Rice County upon a promissory note for \$1,254.90, executed on the first day of January, 1884, and due in twelve months after date, with interest at eight per cent per annum. The defendant alleged that this note had been merged into a judgment rendered in the court of common pleas of Jackson County, Ohio, in an action brought by the Centerville National Bank, of that county. This bank brought an action against William Cackley and Sarah E. Spriggs, to have a certain conveyance of some real estate made by Cackley to Spriggs set aside. The plaintiff in that case had previously obtained a personal judgment, and asked that the conveyance be declared fraudulent as to the creditors of Cackley, that the property be administered for the benefit of the plaintiff and all other creditors who might come in and be entitled to share in the proceeds according to their respective claims and priorities. Summons was served upon the defendants, and notice was given by publication to the creditors of Cackley. The plaintiff below was one of the creditors, and he filed a cross-petition, setting forth the note sued on in this action, and asked to be made a party; and that the lands described in the petition of the Centerville National Bank be sold and administered for the benefit of all of the creditors of Cackley; that an account be taken of the amount due him on his note; and that he be paid out of the proceeds of the sale of the property according to priority. The action of the bank was successful; the conveyance was set aside. A certain deed of assignment made by Cackley was also set aside, and a trustee was appointed by the court, who was authorized to sell the property that had been fraudulently disposed of, and pay the creditors of Cackley according to priority. The trustee, acting under the orders of the court, sold the property, and the court found the amount due and owing the various creditors, and directed the payment of the costs and attorney's fees first, and then the payment of certain creditors in full, which left the claim of Smith unpaid. Upon this state of facts, the plaintiff

asked and obtained a judgment upon the pleadings for the amount due upon his note, in the district court of Rice County.

The only question presented by the record is, whether this was error. Was the note sued upon merged in the proceedings in the common pleas court of Jackson County, Ohio? We are obliged to answer this question in the negative. To make the merger complete, so as to be a bar to any future action upon the same obligation, there must necessarily be a judgment; and such a judgment, too, as can be enforced. Can it be said in this case that the plaintiff below obtained such an order in the common pleas court of Jackson County, Ohio, as he could make available in the collection of his debt after the property subjected to the payment of certain creditors of Cackley had been exhausted? or in other words, could he have brought suit upon the proceedings had in that court and obtained any relief? There was only a finding of the amount due each one of the creditors; and in the same finding of the court there was an order directing the payment of the proceeds to other creditors, which left the plaintiff below in the same condition as when he filed his answer. He had obtained nothing upon his note, and had no order, decree, or judgment which he could enforce. The supreme court of Ohio seemed to have taken this view of a similar order in the case of *Conn v. Rhodes*, 26 Ohio St. 645, which was an action to foreclose a mortgage, with a prayer for a personal judgment. Upon default of an answer, the court entered a decree for the sale of the mortgaged premises, but rendered no personal judgment. The court said: "Where the record in such case showed that the court, on hearing of the cause, 'considered that the plaintiff ought to recover' a specified amount, and ordered the sale of the mortgaged premises for its satisfaction, held, that the record shows no personal judgment against the defendant, but a mere finding of the amount due, with an order of sale."

Judge Cooley said, in the case of *Wixom v. Stephens*, 17 Mich. 518, 97 Am. Dec. 205: "If, by reason of the mistake, the judgment rendered by the justice was not valid, so that the plaintiffs could enforce it, then it would seem that it could not constitute a bar to a new suit on the note. The bar in such a case springs from the party having already obtained a higher security; and where he has got no new security, his remedy upon the original demand is not taken away." The law of the case was stated in the syllabus, that "a debt is not merged

in a judgment until a valid judgment has been obtained upon it."

The supreme court of Nebraska has held that the presentation and proof of a creditor's claim in Illinois against an assigned estate there is not a bar to such creditor's right of action in the former state, there being nothing in the statute of Illinois or in the deed of assignment restricting creditors to their respective demands, or suspending any other remedy previously opened to them: *Gross v. Bunn*, 10 Neb. 217.

The law of merger is thus stated in *Black on Judgments*, sec. 674: "But in order that the principle of merger may apply, it is necessary that the identical cause of action should have passed into judgment, in a litigation between the same parties or their privies, and that the plaintiff should have had a full and complete opportunity to recover his whole demand. In a case in Arkansas, it was held that a judgment against a steamboat,—that being a judgment *in rem*, and not enforceable against the property of the owners,—if unsatisfied, could not be pleaded as a bar to a subsequent action against the owners of the boat on the same contract. In reaching this conclusion, the court said it was evident that a judgment against the vessel was not even substantially a judgment against the owners, and consequently that the former recovery relied on was no bar to the present action": *Toby v. Brown*, 11 Ark. 308; *Freeman on Judgments*, sec. 606.

If the action in the Ohio court is to be treated as a proceeding *quasi in rem*, clearly the note of the plaintiff below was not merged in the orders made by the court in that case. Text-writers and courts make a distinction between actions *in rem* and proceedings *quasi in rem*, and the latter term is applied to suits brought against persons where the plaintiff's object is to subject certain property of those persons to the payment of the claims asserted.

"Such are actions in which property of non-residents is attached and held for the discharge of debts due by them to citizens of the state, and actions for the enforcement of mortgage and other liens. Indeed, all proceedings having for their sole object the sale or other disposition of the property of the defendant to satisfy the demand of the plaintiff are in a general way thus designated": *Freeman v. Alderson*, 119 U. S. 187; *Black on Judgments*, sec. 793.

The action of the Centerville National Bank, in the Ohio court, comes unmistakably within this class of cases. Such

a proceeding of a domestic as well as a foreign court, where jurisdiction over the person of a party has not been obtained, except as to his interest in the property affected by such proceedings, is not conclusive or binding by way of estoppel in another action: *Durant v. Abendroth*, 97 N. Y. 132; Freeman on Judgments, sec. 606.

The same doctrine is stated in Wells on *Res Adjudicata*, sec. 555: "As to actions *in rem*, we may here state in general terms that there can be no rightful action by the tribunal on the basis of jurisdiction acquired by the attachment of property that can reach beyond the property itself, and of course it cannot be enforced in another state."

It necessarily follows from this view of the law that the district court committed no error in sustaining the demurrer of the plaintiff below to the answer of William Cackley.

We recommend an affirmance of the judgment.

By the COURT. It is so ordered.

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JUDGMENTS — FOREIGN — MERGER. — A foreign judgment does not merge the cause of action, but an action may be maintained on the same cause in another country: *Eastern etc. Bank v. Beebe*, 53 Vt. 177; 38 Am. Rep. 665, and note; but it is otherwise with a judgment rendered in a sister state: *Henderson v. Staniford*, 105 Mass. 504; 7 Am. Rep. 551.

JUDGMENTS — RES JUDICATA — MERGER. — When a plaintiff declares upon several notes secured by a mortgage, executed by defendants severally liable, and voluntarily elects to take a personal judgment against one of the defendants, and a decree of foreclosure against the others, the judgment is a merger of the whole cause of action against all the defendants: *Lawrence v. Beecher*, 116 Ind. 312. Where a valid judgment has been rendered on a note of a decedent, the note is no longer a demand; it is destroyed by merger in the judgment: *Wernae v. McPike*, 100 Mo. 476.

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## IN RE NICKELL.

[47 KANSAS, 784.]

CONTEMPT — SELF-CRIMINATION — HABEAS CORPUS. — A party cited for contempt in compelling and inducing witnesses to absent themselves from the court and to disobey a subpoena is thereby charged with a statutory crime, in addition to a contempt of court, and cannot be compelled as a witness to prove the contempt, and thus criminate himself as to the other crime. If committed for contempt in refusing to thus testify, he is entitled to his discharge on *habeas corpus*.

CONTEMPT — PRACTICE. — RULE TO SHOW CAUSE why a party should not be punished for a constructive contempt of court must be based upon a verified complaint or information.

*O. W. Fairchild and S. S. Ashbaugh*, for the petitioner.

GREEN, C. The petitioner, James M. Nickell, alleges that he is illegally restrained of his liberty by the sheriff of Kingman County, because he refused to answer certain questions propounded to him against his will and over his objections, in a certain case pending in the district court of Kingman County, wherein the state was plaintiff and he was defendant, on the 28th day of December, 1891. The material facts are, that on the 26th day of December, 1891, there was pending in the district court of Kingman County a criminal action against the petitioner for selling liquor. The district judge issued an order which recited that there was reasonable ground for believing that the petitioner had, by bribery, menace, false pretensions, coaxing, threatening, and offering to pay for time lost, etc., induced and compelled and caused certain witnesses to absent themselves from court, and disobey a subpoena issued in the case of *State v. James M. Nickell*, who was charged with selling liquors; and being of the opinion that the conduct of the petitioner in inducing, compelling, and causing witnesses to absent themselves from court was calculated to embarrass and obstruct the administration of justice, and was a contempt of court, ordered the petitioner to answer the charge, and show cause why he should not be punished for contempt of court. On the 28th of December, 1891, the petitioner asked for a reasonable time in which to plead to the complaint, which request was overruled. He then objected to being tried under the complaint, and asked to be tried under the statutes, by information, and also asked for a jury. This request was refused by the court. The petitioner, over his objection, was then sworn as a witness, and placed upon the stand to testify on behalf of the state. He refused to answer the questions submitted to him by the state. The court then ordered him committed to the jail of Kingman County until he should answer such questions as had been propounded to him by the state. On the same day that the petitioner was committed, he made application to the probate judge of Kingman County for a writ of *habeas corpus*, which was granted, and a hearing was fixed for the sixth day of January, 1892, and the petitioner was ordered to give a bond for his appearance, which was furnished and approved. On the twenty-ninth day of December the district court ordered a warrant to issue for the arrest of the petitioner, under which he was taken and imprisoned in the county jail. This warrant was issued for the same cause for which the petitioner was originally



committed. The petitioner then made application to this court for a writ of *habeas corpus*, which was granted on the thirtieth day of December, 1891.

The petitioner claims the right to be discharged and released from the order of commitment and warrant of the district court, on the ground that he was charged with a statutory crime; that section 155 of the crimes and punishments act makes it a misdemeanor for any person, by bribery, menace, or other means, to induce any witness to absent himself, or avoid a subpoena, or withhold his evidence, or deter any witness from appearing in and giving evidence in any civil or criminal case; that he was compelled to go upon the witness-stand for the purpose of giving evidence against himself; and had he answered the questions propounded to him, such answers might have had a tendency to criminate him. The protection given by the constitution of the United States to all persons charged with crime is in the following language: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself." The right given under our own constitution reads: "No person shall be a witness against himself, or be twice put in jeopardy for the same offense." It is not only a constitutional right, but it is one of the fundamental principles of the common law, embodied in a maxim, that no man can be compelled to criminate himself. This right has become so much a part of government, in the administration of justice, that it has become as trite as it is true. The sole question for our determination is, whether the well-settled principle is applicable to the case before us. The petitioner is charged with a contempt of court; but the offense with which he is charged is not only a contempt of court, but a statutory crime. Could the state, under such circumstances, compel the petitioner to go upon the witness-stand and give evidence? This question must be resolved in favor of the petitioner. The supreme court of the United States, in the case of *Counselman v. Hitchcock*, 142 U. S. 547, has held that, under the fifth amendment to the constitution of the United States, persons have the right to refuse to answer questions which might be used against them in criminal cases; and that this right must be construed in its broadest sense. The court, in its opinion rendered by Mr. Justice Blatchford, says, in substance: "That it does not find it necessary to consider any other point than that raised under the constitution as to the

privileges of witnesses. It is urged, says the court, that a witness is not entitled to plead the privilege of silence, except in a criminal case against himself; but such is not the language of the constitution. Its provision is, that no person shall be compelled in any criminal case to be a witness against himself. This provision must have a broad construction in favor of the right which it was intended to secure. The matter under investigation by the grand jury was a criminal matter, and the reason given by Counselman for his refusal was, his answer might tend to criminate him. His apprehension was, that the answers might show that he had committed a crime against the interstate commerce act, for which he might be prosecuted. His answers, therefore, would be testimony against himself, and he would not be compelled to give them in a criminal case. It is impossible that the meaning of the constitutional provision could only be that a person should not be compelled to be a witness in a criminal prosecution against himself. The object was to insure that a person should not be compelled, when acting as a witness in an investigation, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard."

The case of the petitioner is stronger than the Counselman case. Here the petitioner is charged with a crime, and the state was seeking to condemn and convict him out of his own mouth. Besides, the language of our constitution, if anything, is stronger than the fifth amendment to the constitution of the United States. Both by the letter and spirit of section 10 of the bill of rights, no person shall be a witness against himself. It does not even limit the right to criminal cases. We think the case of the petitioner comes clearly within the rule and right given by the fifth amendment to the constitution of the United States and the recent decision of the supreme court referred to, as well as section 10 of the bill of rights of our own constitution.

Another fatal objection which might be urged against the proceedings is, that the alleged contempt was not charged to have been committed in the presence of the court, and there was no written complaint, properly verified, containing a statement of the facts constituting the offense, filed with the court. This has been held to be necessary in all cases of constructive contempt: See *State v. Henthorn*, 46 Kan. 613; *State v. Vincent*, 46 Kan. 618. There was a paper signed by the judge, called a

complaint, but it was in fact an order for the petitioner to show cause why he should not be punished for contempt, and it was not verified. If it be true, as counsel for the state has intimated, — and there seems to be some ground for the charge, — that there has been a disposition to obstruct the administration of justice and disregard the court's processes to secure the attendance of witnesses in the original case of which the present proceeding is an outgrowth, the prosecuting officer should see to it that the parties, whoever they may be, should be dealt with, and that condign punishment be administered to all persons who may be guilty of so grave an offense as interfering with the orders and processes of the court, or obstructing the administration of justice through the courts of the land. The remedy is plain and simple. Where parties have committed a crime of the nature charged in this case, the court can direct the county attorney to proceed against the parties as charged, or the county attorney can, upon his motion, proceed against them; and if the offense is as grave as claimed here, it is his duty to do so.

It is recommended that the petitioner be discharged.

By the COURT. It is so ordered.

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**CONTEMPT — CRIMINAL — WHAT IS.** — Any act of disrespect to a court or its process, which obstructs the administration of justice, is a criminal contempt: *Ex parte Robertson*, 27 Tex. App. 628; 11 Am. St. Rep. 207. It is a crime to dissuade, hinder, and prevent a witness from appearing before a court in obedience to a summons: *Commonwealth v. Reynolds*, 14 Gray, 87; 74 Am. Dec. 665. and note. An act which constitutes a contempt may also be a crime and punished as such, notwithstanding the punishment for contempt: *In re Griffin*, 98 N. C. 225; *Ex parte Acock*, 84 Cal. 50.

**WITNESSES — PRIVILEGE.** — No one can be required to testify if his testimony would subject him to a criminal prosecution: *Louisville etc. R. R. Co. v. Hall*, 91 Ala. 112; 24 Am. St. Rep. 863, and note.

## WHITE v. GEMENY.

[47 KANSAS, 741.]

**REPLEVIN — PLEADING.** — Any defense to an action of replevin may be proved under a general denial.

**EXEMPTIONS.** — OMNIBUS OWNED BY HOTEL-KEEPER, and used by him in his business, is exempt from execution, under a statute exempting "the necessary tools and instruments of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade or business."

**REPLEVIN.** Subdivision 3 of section 4 of the Kansas exemption statute, spoken of in the opinion, is sufficiently given in the *syllabus*. The remaining facts are stated in the opinion.

*Thomas Dever*, for the plaintiff in error.

*James V. Humphrey*, for defendant in error.

**STRANG, C.** Action of replevin to recover the possession of a hotel bus. The plaintiff filed the usual petition in replevin, to which the defendant answered by a general denial, and also answered that the bus was taken by the defendant, a constable, on an execution issued on a judgment against the defendant. No reply was filed to the answer. The defendant moved for a judgment on the pleadings, which motion was overruled. The cause was then tried by the court without a jury, upon an agreement that if the court found the bus was exempt the judgment should be for the plaintiff; otherwise it should be for the defendant. The court found for the plaintiff. The defendant filed a motion for new trial, which was overruled.

The plaintiff in error contends that he was entitled to judgment on the pleadings. We think not. This was an action of replevin, and the only pleadings necessary were the petition of the plaintiff, and an answer containing simply a general denial. Any defense the defendant may have had could have been given in evidence under the general denial: *Bailey v. Bayne*, 20 Kan. 657; *Yandle v. Crane*, 13 Kan. 344; *Kennett v. Fickel*, 41 Kan. 211. All of his answer, therefore, except his general denial, was wholly unnecessary, and being unnecessary, required no reply. If the defendant under the general denial could have shown that he took the property as an officer under legal process, the plaintiff could, without a reply, rebut the effect of such proof by showing that the property taken was exempt. We have noticed the cases cited by the plaintiff in error: *Babcock v. Farmers' etc. Bank*, 46 Kan. 548, and

*Scott v. Morning*, 18 Kan. 489, and others. None of these cases were replevin cases, and as the same rule does not prevail in the class of cases cited as in replevin cases, they are not in point.

The plaintiff in error also contends that the court erred in its finding that the property was exempt, and in rendering judgment thereon for the plaintiff below. We see no reason why the business of hotel-keeping is not within the third subdivision of section 4 of the exemption statute; and the trial court having found, under the evidence relating thereto, that the bus was a necessary adjunct to the hotel business of the plaintiff below, we think it must be held to be within the description in said statute of tools and implements used and kept by the debtor for the purpose of carrying on his business: *Wilhite v. Williams*, 41 Kan. 288; 13 Am. St. Rep. 281; *Davidson v. Sechrist*, 28 Kan. 324. In *Richards v. Hubbard*, 59 N. H. 158, 47 Am. Rep. 188, it is held "that a physician's wagon and harness, used by him in riding to visit his patients, and reasonably necessary for his practice of his profession, are 'tools of his occupation,' within the meaning of General Laws, chapter 224, section 2, exempting property from attachment."

It is said that it does not appear that the plaintiff below was a resident of the state of Kansas when this suit was begun. On page 10 of the record he testified, "I reside at Junction City, Davis [Geary] County, Kansas"; and we think the remainder of the evidence shows him residing there at the commencement of the suit. It is recommended that the judgment of the district court be affirmed.

By the COURT. It is so ordered.

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**EXECUTION — EXEMPTION — NECESSARY TOOLS OF OCCUPATION.** — The horse, harness, and buggy of an insurance agent, used in his business, fall within section 3 of the Kansas act relating to exemptions: *Wilhite v. Williams*, 41 Kan. 288; 13 Am. St. Rep. 281, and note; extended notes to *Kilburn v. Demming*, 21 Am. Dec. 545, *Richards v. Hubbard*, 47 Am. Rep. 190, and *Baker v. Willis*, 25 Am. Rep. 63, in which the meaning of the word "tools," as used in the exemption statutes, is thoroughly discussed.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**MISSOURI.**

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**STATE v. WARFORD.**

[108 MISSOURI, 55.]

**BURGLARY, EVIDENCE SUFFICIENT TO JUSTIFY JURY IN INFERRING BREAKING IN PROSECUTION FOR. —** Where, upon the trial for the burglary and larceny of a saddle from a stable, the evidence shows that the saddle was hung in its usual place on Sunday, and was not missed until the succeeding Wednesday, that the doors of the stable were intentionally kept fastened for the purpose of keeping in the stable some mares and colts that would have escaped therefrom if the door had been left open, and that it was not known that the doors were left open, such evidence is sufficient to warrant the jury in inferring the fact of breaking the stable by the thief.

**PRESUMPTION OF GUILT FROM RECENT POSSESSION OF STOLEN PROPERTY. —** The presumption of guilt arising from the recent possession of stolen property is applied in cases of burglary and larceny as well as to cases of larceny. But such possession must, in order to raise the presumption of guilt, be an exclusive possession; and where, on the trial of two persons for burglary and larceny, the evidence shows that the joint possession of the stolen property did not commence until five or six weeks after the larceny, such joint possession is too remote to create a presumption that either of the defendants is guilty of the burglary.

**PROSECUTING OFFICER, IMPROPER REMARKS BY, IN ARGUMENT SHOULD BE AVOIDED. —** Prosecuting officers should avoid remarks or arguments which are calculated to improperly influence juries to go outside the evidence and instructions to determine the grade of the offense for which a conviction should be had. An argument by such an officer that a conviction for petit larceny would impose on the county and tax-payers large expenses should therefore be avoided.

*Hicklin and Yates, for the appellant.*

*John M. Wood, attorney-general, and J. A. Selby, for the state.*

**MACFARLANE, J.** Defendant and one John Webb were jointly indicted, by a grand jury of Daviess County, of the burglary and larceny of a saddle belonging to one Lewis Best. There was a dismissal as to Webb, and defendant was tried and convicted. From the judgment he appeals.

1. Defendant complains that the evidence of burglary was not sufficient to justify his conviction of that crime.

The saddle, which was the subject of the larceny, was kept in the barn of Lewis Best, the owner. The barn was about thirty-two by forty-eight feet in dimensions, and had a driveway through it from east to west, with stables on each side of the west end. The driveway was inclosed by large double doors at each end, one above the other; the saddle was kept hanging on a nail in the partition on the south side of the stable. The doors were fastened by latches. The saddle was hung in its usual place on Sunday, and was not missed until the succeeding Wednesday. Between those dates it was taken. Best and two employees, Powell and Cunningham, had charge of the barn during this time. Neither of the first two could testify positively that the doors were kept closed and fastened during the whole of this interval. They could not be positive; they supposed they were; they were generally shut. Cunningham, who had charge of Best's horses, was more positive. He testified that at the time three mares were kept in the stable, one with a young colt, the other two to have colts. He testified the doors were kept fastened to keep the mares inside, the weather, as he remembered, being stormy; and if the door had been left open the mares would have escaped from the stable. He could not remember positively of fastening the doors on these particular days, nor of seeing that they were kept fastened.

The substantive facts to be proved in this case, in order to support the conviction for the crime of burglary, were that of "breaking and entering" the stable, in which the saddle was at the time stored, with the intent to steal therefrom. While proof of breaking was necessary, the use of very slight force, if proved, will sustain the conviction. Displacing the fastenings provided for the security of the barn and stable and their contents would constitute a sufficient breaking under the statute. This proposition is not controverted by defendant, but he contends that the evidence did not show affirmatively and definitely that the doors were closed when defendant might



have entered, and consequently there was not sufficient evidence of breaking.

It is seldom that a burglary can be proved by the direct and positive evidence of witnesses who have knowledge of the fact. The inference of guilt, in most instances, has necessarily to be drawn from other facts satisfactorily proved. The sufficiency of the evidence in any case belongs exclusively to the jury; the competency of the evidence is to be determined by the court. "By satisfactory evidence, which is sometimes called sufficient evidence, is intended that amount of proof which ordinarily satisfies an unprejudiced mind beyond reasonable doubt. The circumstances which will amount to this degree of proof can never be previously defined; the only legal test of which they are susceptible is their sufficiency to satisfy the mind and conscience of a common man; and so to convince him, that he would venture to act upon that conviction, in matters of the highest concern and importance to his own interests": 1 Greenl. Ev., sec. 2, p. 4.

The question is, whether, from facts satisfactorily proved, a legitimate inference can be drawn that the doors were fastened when the thief entered the stable and took the saddle therefrom.

It would have been impossible for any one of the three witnesses, who were engaged in the ordinary work and business of the farm, to have testified positively that at no time during the interval from Sunday to Wednesday the doors had not been left open for some period. To require such direct and positive proof would be almost equivalent to saying that a burglary could not be proved when committed in a barn, stable, or other outhouse on a farm, as to keep a constant watch over them would be wholly impracticable.

The evidence in this case shows that at the time of the larceny, the barn was intentionally kept fastened for a particular purpose. So far as the witnesses knew, the doors were fastened all the time; that is, none of them knew of them being left open. If they had been left open the mares could have gone outside, which fact would have been known. We think all this evidence competent to go to the jury, as tending to prove that the door was fastened when the thief entered, and sufficient in probative force to justify the jury in the inference that a burglary was committed.

2. The court gave the following instruction on behalf of the state: "6. The court instructs the jury that if they believe

from the evidence that the saddle in question was in the barn of Lewis Best, and that the doors of the said barn were fastened in the manner described by the witnesses, and that said barn was broken and entered, and that said saddle was stolen from said barn, and that recently after said saddle was so stolen, and after said breaking and entering, said saddle was found in the possession of the defendant, or in the possession of defendant and another person, then the law presumes that the defendant is guilty of both the burglary and larceny; and unless the defendant accounts for such possession to the satisfaction of the jury in a manner consistent with his innocence, then the presumption of his guilt, both of the burglary and larceny, becomes conclusive against him."

At the request of defendant the court instructed the jury as follows: "Although the saddle was in the wagon in which defendant John Webb traveled to Kansas, yet if the jury find that defendant had nothing more to do with said saddle than to ride the same while in Kansas, and that said Webb, without further control or dominion over said saddle by defendant, sold the same to witness Belcher, and that Webb and defendant were not acting in concert, then said saddle was not in the possession of the defendant within the meaning of the state's instruction."

It is contended that the first of the instructions as a whole was improper, for the reason that the mere possession of goods burglariously stolen is not sufficient to create the presumption of guilt in the one in whose possession they were found. The rule is well settled in this state, as well as others, that "the presumption which the law raises as to recent guilty possession is not confined to theft, nor to any class or species of felony, but is applied even to cases where the highest penalties are inflicted, as in a case of arson, . . . and . . . of burglary and larceny": *State v. Babb*, 76 Mo. 503, and authorities cited; *State v. Wheeler*, 79 Mo. 366. This objection cannot be sustained.

3. The evidence bearing upon the question of possession of the stolen goods, soon after the larceny, was obtained from the testimony of defendant, John Webb, who was jointly indicted with him, Belcher, a cousin of each of them, who resided near Weston, and Light, the marshal of Weston, who arrested defendant.

It is undisputed that defendant and Webb some time in May started from the neighborhood in which the saddle was

stolen, and traveled in a two-horse wagon to Kansas, remained a few days, and returned to Belcher's home near Weston, and that the saddle was carried in the wagon throughout the trip, each of the parties using it when he desired to do so.

Webb testified that a few days before they started to Kansas, defendant took him to an out-of-the-way place and showed him the saddle, which he said he was going to take along. They started after night. When they got near where the saddle was concealed, they brought and put it in the wagon. Webb also testified that when they got to Belcher's on their return from Kansas, defendant told Tom Belcher that he had a saddle he wanted to leave with him, and that Tom took it in the house and put it under the bed.

Defendant testified that he never saw the saddle until the morning after they started to Kansas; it was then in the wagon, and Webb told him he had brought it; that he made no claim to the saddle at any time, and when they got to Belcher's, Webb sold it to Tom.

Belcher testified that when they came to his house they had the saddle in the wagon, and Webb claimed to own it, and sold it to him. Light, the marshal who arrested defendant, testified that he found him at Belcher's, sitting outside the door. When he reached the house, old man Belcher asked if he wanted him, and defendant answered, "No; I am the man you want." Witness told him he wanted the saddle also. They said, "It is in the house." No explanation for the arrest was asked. This was in substance the evidence as to the possession of the saddle.

It would be pushing the rule too far to require of one accused of a crime an explanation of his possession of the stolen property, when such possession could also, with equal right, be attributed to another. He could not reasonably be required to account for or explain the possession of another. "To raise the presumption of guilt from the possession of the fruits or the instruments of crime by the prisoner, it is necessary that they be found in his exclusive possession": *State v. Castor*, 93 Mo. 250; 3 Greenl. Ev., sec. 33.

We must conclude that the instruction, in declaring that a presumption of guilt arose if the saddle, recently after the burglary, was found in the possession of defendant and another person, did not properly declare the law.

4. After careful consideration and much doubt, we have reached the conclusion that the sixth instruction given de-

defendant did not cure the fault of the sixth given the state. If the latter had confined the possession to defendant and Webb, then the former instruction might have sufficiently explained the character of the joint possession referred to in the latter, which would create the presumption of guilt.

But was there such unexplained and recent joint possession of both defendant and Webb as would reasonably raise an inference even that the burglarious act charged was their joint act? If the joint possession raise a presumption of guilt against one, it does also against the other. There is no evidence tending to prove that the joint possession commenced until the stolen property was placed in the wagon which was under their joint control. The possession, then, of both did not commence until five or six weeks after the larceny. No connection or confederacy between the parties was shown to have existed prior to the preparations for their journey to Kansas. There is no evidence that the saddle was in the joint possession of these parties for a considerable time after it was stolen, during which time it must have been in the exclusive individual possession of one or the other of them. When the stolen property was put into the wagon, one party may possibly have been wholly without knowledge of the fact that it had been stolen, or he may have known that it was stolen, but took no further responsibility therefor, or he may have known it was stolen, and undertook to assist in concealing and disposing of it; but none of these facts, however well proved, or however criminal in themselves, would make him guilty of breaking into the barn with the intent to steal; much less would the mere fact of having the saddle in the wagon, without other explanation, raise a presumption of such breaking. Under the evidence, we think the joint possession too remote to create a presumption that either Webb or defendant was guilty of the burglary.

The joint possession is also fully explained by the testimony of Webb, who was called as a witness by the state, and the presumption of joint guilt is thereby rebutted. If the evidence of Webb should be believed by the jury, then they could find that the saddle was in the exclusive possession of defendant when shown to Webb by him, and that possession was sufficiently recent, if unexplained, to create a presumption of guilt.

5. A defendant should be tried and convicted upon the evidence. Prosecuting officers should avoid remarks or arguments which are calculated to improperly influence juries to

go outside the evidence and instructions to determine the grade of the offense for which a conviction should be had. Proper zeal is commendable, but it should not, particularly in state prosecutions, be allowed to carry the prosecutor beyond the law and evidence. The law fixes the grades of crimes, and the state, in enforcing the laws, should not undertake to change the grades fixed by itself to avoid the necessary expense resulting from a conviction therefor. The argument that a conviction for petit larceny would impose on the county and tax-payers large expense should have been avoided. The people by their representatives have fixed the punishment for petit larceny, and the law should have its course.

For the errors mentioned, the judgment is reversed and cause remanded.

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**CRIMINAL LAW — BURGLARY — BREAKING IN.** — Before an accused can be convicted of burglary, it must be shown that the door through which he passed was closed: *Lowder v. State*, 63 Ala. 143; 35 Am. Rep. 9; *McGrath v. State*, 25 Neb. 780; *Kelly v. State*, 82 Ga. 441; *State v. Wilson*, 1 N. J. L. 439; 1 Am. Dec. 216. The offense of burglary cannot be made out without clear proof of breaking in: *People v. McCord*, 76 Mich. 200. As to what constitutes a breaking as an element of the crime of burglary, see *Kent v. State*, 84 Ga. 438; 20 Am. St. Rep. 376, and note.

**CRIMINAL LAW — BURGLARY — EVIDENCE — POSSESSION OF RECENTLY STOLEN GOODS.** — Possession of recently stolen goods, to warrant an inference of guilt of burglary, must be personal, unexplained, and exclusive: *Jackson v. State*, 28 Tex. App. 370; 19 Am. St. Rep. 839, and note; *Gravely v. Commonwealth*, 86 Va. 396. Unexplained possession of stolen goods does not authorize a conviction of burglary, but it is a circumstance for the jury to consider: *Falvey v. State*, 85 Ga. 157; *People v. Hannon*, 85 Cal. 374; *State v. Jennings*, 79 Iowa, 513.

**TRIAL — IMPROPER REMARKS BY COUNSEL.** — Inflammatory and improper language by the prosecuting officer during the trial for a criminal offense will cause a conviction to be set aside: *Martin v. State*, 63 Miss. 505; 56 Am. Rep. 812, and extended note; extended note to *Cleveland Paper Co. v. Banks*, 48 Am. Rep. 336; *State v. Young*, 99 Mo. 666.

**SMITH v. BURRUS.**

[100 MISSOURI, 94.]

**PRACTICE — OBJECTIONS TO PETITION THAT MAY BE RAISED FOR FIRST TIME IN APPELLATE COURT.** — The question whether the petition states facts sufficient to constitute a cause of action, and the question whether the court has jurisdiction of the subject-matter of the action, are never waived, and may be taken advantage of for the first time in the appellate court.

**MALICIOUS PROSECUTION, ACTION FOR, MAINTAINABLE WITHOUT ARREST OF DEFENDANT IN ORIGINAL ACTION OR SEIZURE OF HIS PROPERTY.** — An action for malicious prosecution may be maintained, although the original action was begun by civil summons, and the defendant in that action was not arrested nor his property seized.

**MALICE, VOLUNTARY DISMISSAL OF CIVIL SUIT NOT PRIMA FACIE EVIDENCE OF.** — The voluntary dismissal of a civil suit by the plaintiff therein will not, in a subsequent suit against him for malicious prosecution, constitute *prima facie* evidence of malice.

**PROBABLE CAUSE, MALICE NOT NECESSARILY DEDUCIBLE FROM WANT OF.** — In an action for malicious prosecution, the deduction of malice from a want of probable cause is not a necessary one. Malice may be inferred from the want of probable cause, and from the voluntary dismissal of the alleged malicious suit, but such inference is one of fact, to be drawn by the jury under proper instructions.

**PREPONDERANCE OF EVIDENCE SUFFICIENT IN ALL CIVIL ACTIONS.** — A preponderance of evidence is, in all civil actions, sufficient to make out a case for either litigant. The plaintiff, therefore, in a suit for malicious prosecution, founded on an action for slander and its voluntary dismissal, is only bound to establish the truth of the slanderous words by a preponderance of evidence.

**CANDIDATE FOR OFFICE, FALSE STATEMENTS DEFAMATORY OF, NOT PRIVILEGED.** — False statements defamatory of the character of a candidate for public office, although made in good faith, are not privileged.

*Harrison and Mahan, and S. W. Birch, for the appellant.*

*R. C. Cramer, J. D. Moore, and McKee and Jayne, for the respondent.*

**SHERWOOD, P. J.** Action for malicious prosecution. Burrus brought suit against Smith for slander, alleging that the latter had charged him with stealing horses; but after Smith had been thus put to the trouble and expense of employing counsel to defend the suit, Burrus, as he admitted in his answer, voluntarily dismissed the suit he had brought, and when on the witness-stand testified: "I dismissed the suit voluntarily, because I wanted to."

It appeared in evidence on the trial that, at the time the charges were made by Smith, Burrus was running for justice of the county court in the eastern district of Scotland County,

and the charges were made by Smith, who himself lived in that district, to other voters, and that affidavits were read by others implicating Burrus as an accomplice with one Mayfield in larcenous operations in regard to horses. Mayfield shortly before the election came off was convicted and sentenced for five years to the penitentiary. There was testimony adduced at the trial, which certainly had a strong tendency to show that the charges made by Smith were not unfounded, and there was some testimony of a contrary effect.

The instructions, so far as necessary, will be quoted and noticed in the opinion. The jury found for the defendant; hence this appeal.

1. At the outset of the examination of the case at bar we are met by the preliminary question, whether the facts stated in the petition constitute a cause of action.

This point, under our Civil Code of Procedure, is always open to examination even in an appellate court, and like the jurisdiction of the court over the subject-matter of the action, is never waived, and may be taken advantage of for the first time on appeal: R. S., sec. 2047; *Sweet v. Maupin*, 65 Mo. *loc. cit.* 72; *McIntire v. McIntire*, 80 Mo. *loc. cit.* 473; *Walker v. Bradbury*, 57 Mo. 66.

The authorities are in conflict as to whether a petition states a cause of action which merely alleges that a civil action brought and prosecuted maliciously, and without probable cause, has been terminated in favor of the defendant, many of the authorities maintaining that no cause of action exists unless such civil process be accompanied by arrest of the person or seizure of the property; and that the plaintiff in such original action in contemplation of law is sufficiently punished by the payment of costs. This view has received the sanction of Judge Cooley: *Law of Torts*, 2d ed., 217 et seq., and cases cited.

But there are numerous and able decisions in opposition to this view, and it is difficult to combat the force of the reasoning they employ. It is difficult to see why the right of a plaintiff, who as defendant has been sued in a civil action maliciously and without probable cause, and who has been put to great expense in consequence thereof, should be altered or at all affected merely by the incident of his property having been attached or his person seized; for in either case the damage, the expense and costs of defending a suit, whether instituted by *ca. sa.* or attachment, or by civil summons, would be



the same. And it is clear that the recovery of costs would not, under our practice, reimburse him for his attorney's fees, something which, and other incidental expenses, he does recover under the English practice.

The cases on both sides of this subject have been extensively collated and exhaustively reviewed by John D. Lawson in 21 Am. Law Reg., N. S., 281, 353, and the conclusion reached that the better doctrine is that which allows an action to be maintained as well where property, etc., has not been seized as where it has. The authorities also are well reviewed in 14 Am. & Eng. Ency. of Law, tit. Malicious Prosecution, pp. 32 et seq., and notes. Besides, this court in *Brady v. Ervin*, 48 Mo. 533, adopted the view that an action for malicious prosecution may be maintained where the original action was begun by civil summons alone.

2. Of its own motion the court gave instruction numbered 1: "The court on plaintiff's behalf, of its own motion, instructs the jury that if they find from the evidence that, in the defendant's suit against the plaintiff, this defendant's charge of slander was false, and that said suit was instituted with malice, and that said suit was also instituted without probable cause, and that this plaintiff was damaged thereby, the jury will find for the plaintiff in an amount not exceeding the amount claimed in this plaintiff's petition. If the jury find that this defendant's charge of slander was false, then the proof of want of probable cause, being the proof of a negative, may be made out by slight evidence, but malice is not to be necessarily inferred from the want of probable cause. Malice is the intentional doing of a wrongful act without just cause or excuse; [and the jury are instructed that, under the pleadings in this case, it is admitted that defendant, Burrus, voluntarily instituted and voluntarily dismissed said slander suit of *Burrus v. Smith*, and the court further instructs the jury that such voluntary dismissal of said slander suit is in this cause *prima facie* evidence of malice on the part of defendant, Burrus]."

Attention will now be directed to that portion of that instruction which is inclosed in brackets.

Instruction numbered 1, asked by the plaintiff, but refused him, is to the same effect, and as to that portion of the instruction, of course the plaintiff would have no right to complain. We do not regard either instruction as asserting the law on this point. In the Law of Torts, 2 ed., pp. 214, 215, it is

said by Judge Cooley: "The burden of proving that the prosecution was malicious is also upon the plaintiff. If a want of probable cause is shown, malice may be inferred; but the deduction is not a necessary one, and the mere discontinuance of a criminal prosecution, or the acquittal of the accused, will establish for the purposes of this suit neither malice nor want of probable cause. But if an arrest is made in a civil suit which is afterward voluntarily discontinued, the discontinuance has been held to furnish *prima facie* evidence of a want of probable cause."

If the discontinuance of a criminal prosecution, instituted by the defendant, and discontinued at his instance, be evidence which establishes neither malice nor want of probable cause, it is difficult to see how the voluntary discontinuance of a civil action instituted by defendant can cut a wider swath. *Prima facie* evidence of a fact, said Mr. Justice Story, "is such evidence as in judgment of law is sufficient to establish the fact, and if not rebutted remains sufficient for the purpose": *Lilienthal's Tobacco v. United States*, 97 U. S., *loc. cit.* 268, and cases cited. The portion of the instruction heretofore referred to, therefore, in effect told the jury that the voluntary dismissal of the civil action begun by defendant made out a case for the plaintiff without more; but this was not the law. The instructions, therefore, referred to were tantamount to saying that the mere discontinuance of the action for slander was sufficient in and of itself to make out a case of malice on his part; but, as already seen, this is not the law. As Judge Cooley says, the deduction of malice from a want of probable cause is not a necessary one. Of course, malice may be inferred from the want of probable cause, and from the voluntary dismissal of the original civil action; but such inference is one of fact, and one for the jury, under appropriate instructions, to draw.

8. In regard to the words used by plaintiff which gave origin to the suit for slander, the court instructed the jury that: "And to warrant the jury in finding that the said alleged language was true, the same evidence must be adduced by plaintiff as would be necessary to convict the defendant upon indictment for horse-stealing, and if the jury believe from the evidence that plaintiff uttered the said words of and concerning defendant, and entertain a reasonable doubt of defendant's guilt of the crime imputed to him in said words, the jury should find a verdict for defendant. By a reasonable doubt is meant a substantial doubt, based on and arising from the

evidence, and not a mere possibility of defendant's innocence."

This view of the law, though sustained by the case of *Polston v. See*, 54 Mo. 291, by a divided court, was unanimously overthrown in the case of *Edwards v. Knapp & Co.*, 97 Mo. 432; and the now generally prevalent modern doctrine established, that in all civil actions a preponderance of the evidence is sufficient to make out a case for either litigant.

Besides, in actions of this sort, such an instruction is wholly out of place; whether a party is suing or sued for malicious prosecution, the absolute guilt of the particular individual is not at all a controlling issue; absence of malice and probable cause are the governing factors and constituent elements of the forensic contest.

The remaining point to be discussed is, whether the court should have given instruction numbered 4, asked by plaintiff, but refused by the court, which was the following: "If the jury believe from the evidence that defendant, Burrus, was a candidate for the public office of county judge in and for the eastern district of Scotland County, Missouri, at the general election of the year 1884; and if the jury further believe from the evidence that the character, honesty, and fitness of said Burrus to fill such public office was relevant to the candidacy of said Burrus, and necessary to be known by the voters and constituents of said Burrus at said general election, for their own interest and protection; and if the jury further find from the evidence that the language shown by the testimony in this case to have been used by Smith about Burrus was so used by said Smith to some of the voters and constituents of said Burrus, at said general election, and to none other, in a private, oral discussion of the character, and honesty, and fitness of said Burrus to fill such public office, and that said language was so used in good faith for the purpose of giving such voters and constituents relevant and proper information for their own interest and protection, and that said language was so used by said Smith, in said eastern district of Scotland County, after said Burrus had been nominated for said public office, and before said general election in said eastern district, and that said Smith was a voter at said general election in said eastern district, — then the court instructs the jury that such language so used by said Smith is privileged; that said Smith had the right to so use the same; and that defendant Burrus did not have reasonable and probable cause for bringing said suit for slander against plaintiff, Smith."

There is a conflict of authority on the question whether such an instruction should be given in instances like the present; but as this case is one of the first impression in this state, we are free to adopt that rule which we regard as best comporting with the proper preservation of the rights of individuals, good government, social order, justice, and sound reason. The correct rule, we take it, is that expressed by the supreme court of Massachusetts in *Commonwealth v. Clap*, 4 Mass. 163, 3 Am. Dec. 212, where Chief Justice Parsons, speaking for the court, said: "When any man shall consent to be a candidate for a public office conferred by the election of the people, he must be considered as putting his character in issue, so far as it may respect his fitness and qualifications for the office; and publications of the truth on this subject, with the honest intention of informing the people, are not a libel; for it would be unreasonable to conclude that the publication of truths which it is the interest of the people to know should be an offense against their law. . . . For the same reason, the publication of falsehood and calumny against public officers or candidates for public offices is an offense most dangerous to the people, and deserves punishment; because the people may be deceived, and reject the best citizens, to their great injury, and it may be to the loss of their liberties."

This expression of the law was cited approvingly in *Wheaton v. Beecher*, 66 Mich. 307, an action for libel, with plea of privileged communication regarding a candidate for a public office, and Sherwood, J., in delivering the opinion of the court, said: "The libel in this case was not privileged. It is true, the plaintiff was a candidate for appointment to the office of comptroller of the city of Detroit; but this did not license the defendant or any other person to vilify, falsify, and calumniate the character of the plaintiff for honesty, integrity, and morality. There is no doubt that when a man in this country becomes a candidate for an office, elective or appointive, his character for honesty and integrity, and his qualifications and fitness for the position, are put before the people, and are thereby made proper subjects for comment, and that publications of the truth in regard to the candidate are not libelous; and it is equally true that the publication of falsehood against such candidate is wrong, and deserves to be punished."

*Bronson v. Bruce*, 59 Mich. 467, 60 Am. Rep. 307, was also an action for libel on a candidate for a public office, and the claim of privilege was also interposed, but Champlin, J., as

the organ of the court, said: "The electors of a congressional district are interested in knowing the truth, not falsehoods, concerning the qualifications and character of one who offers to represent them in Congress; and it is the right and privilege of any elector, or person also having an interest to be represented, to freely criticise the act and conduct of such candidate, and show, if he can, why such person is unfit to be intrusted with the office, or why the suffrages of the electors should not be cast for him. But defamation is not a necessary and indispensable concomitant of an election contest. . . . To hold that false charges of a defamatory character, made against a candidate, are privileged as matters of law, if made in good faith, and that the party making them is absolutely shielded against liability, it seems to me is a most pernicious doctrine. It would deter all sensitive and honorable men from accepting the candidacy to office, and leave the field to the profligate, the unprincipled, and unworthy; to men who have no character to lose, no reputation to blemish. It could scarcely be expected that any man worthy of the position would consent to stand for an office and have his reputation tarnished, his good name scandalized, in the face of the whole community, if such doctrine as this is to prevail. Besides, under the guise of assisting the people to select a fit man, the voters are deceived by falsehood, and induced to withhold their support from the maligned candidate, and so two wrongs are perpetrated, — one upon the candidate, the other in misleading the voter."

At an early day in Tennessee the same question arose, and a similar ruling was made, Overton, J., remarking: "Slander is no more justifiable when spoken of a man with a view to his election than on any other occasion. Unhappy, indeed, would any people be, where in the exercise of one right you destroy as important a one. . . . Let his talents, his virtues, and such vices as are likely to affect his public character, be freely discussed, but no falsehoods be propagated": *Brewer v. Weakley*, 2 Over. 99; 5 Am. Dec. 656.

The same view of the law prevails in West Virginia, where Green, President, delivering the opinion of the court, in speaking of the degree of freedom with which the character of a candidate for public office may be treated, said: "As this right of criticism is confined to the acts or conduct of such candidate, whenever the facts which constitute the act or conduct criticised are not admitted, they must of course be proven. . . .

His talents and qualification, mentally and physically, for the office he asks at the hands of the people, may be freely commented on in publications in a newspaper, and though such comments be harsh and unjust, no malice will be implied, for these are matters of opinion of which the voters are the only judges; but no one has a right by a publication falsely to impute crimes to such a candidate, or publish allegations falsely affecting his character": *Sweeney v. Baker*, 13 W. Va. 183; 31 Am. Rep. 757.

The same rule prevails as to the conduct of a public officer as that relating to a candidate for office, as the authorities show; and in regard to what are privileged communications respecting the former class, Folger, C. J., said: "We are of the opinion that the official act of a public functionary may be freely criticised, and entire freedom of expression used in argument, sarcasm, and ridicule upon the act itself; and that then the occasion will excuse everything but actual malice and evil purpose in the critic. We are of the opinion that the occasion will not of itself excuse an aspersive attack upon the character and motives of the officer; and that to be excused, the critic must show the truth of what he has uttered of that kind": *Hamilton v. Eno*, 81 N. Y. 126.

The doctrine here asserted is also prevalent in Illinois. In *Rearick v. Wilcox*, 81 Ill. 77, Craig, J., said: "While the qualification and fitness of a candidate for office might properly be discussed with freedom by the press of the country, we are aware of no case that goes so far as to hold that the private character of a person who is a candidate for office can be destroyed by the publication of a libelous article in a newspaper, notwithstanding the election may be attended with that excitement and feeling that not unfrequently enters into our elections. . . . The law required appellee, as the publisher of a journal, to publish facts, and not libelous articles. The character and reputation of appellant was as sacred, and as much entitled to protection, when a candidate for office as at any other time."

The same doctrine is announced in other states, and we regard it as the better one, especially in this day and age when in heated political campaigns the "rattling tongue of noisy and audacious" slander, and what Lord Mansfield in *Rex v. Wilkes*, 4 Burr. 2562, calls "that *mendax infamia* from the press," sorely need to have placed upon them some fetter, some check, some curb, which shall be able, in some degree at

least, to restrain them within something like legitimate boundaries, and something like a decent regard for private character. Within these bounds of legitimate discussion, all that is necessary to say and proper to say respecting the actions and qualifications of candidates or public officers may legitimately be said, without descending into the sinks and cess-pools of vituperation.

For the errors aforesaid, the judgment should be reversed and the cause remanded.

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**MALICIOUS PROSECUTION — ACTION FOR, WITHOUT ARREST OF PERSON OR SEIZURE OF PROPERTY — WHETHER MAINTAINABLE.** — It is not necessary, in order to maintain an action for the malicious prosecution of a civil suit, that the person should be molested or his property seized: *Antcliff v. June*, 81 Mich. 477; 21 Am. St. Rep. 533, and note; *Brand v. Hinckman*, 68 Mich. 590; 13 Am. St. Rep. 362, and note.

**MALICIOUS PROSECUTION — MALICE — DISMISSAL OF ACTION AS EVIDENCE OF.** — No implication of want of probable cause is raised by the fact that a prosecution was abandoned: *Cockfield v. Braveboy*, 2 McMull. 270; 39 Am. Dec. 122. Discharge by *nolle prosequi* is not *prima facie* evidence of malice: *Yocum v. Polly*, 1 B. Mon. 358; 26 Am. Dec. 583; see *Savage v. Brewer*, 16 Pick. 453; 28 Am. Dec. 255, and note.

**MALICIOUS PROSECUTION — MALICE — WANT OF PROBABLE CAUSE AS EVIDENCE OF.** — Malice may be inferred from want of probable cause, but it may be rebutted by proof that the prosecutor was honest in his belief of the defendant's guilt: *Lansford v. Dietrich*, 86 Ala. 250; 11 Am. St. Rep. 37, and note. A presumption of malice is raised by want of probable cause: *Brand v. Hinckman*, 68 Mich. 590; 13 Am. St. Rep. 362, and note.

**LIBEL — FALSE STATEMENTS CONCERNING CANDIDATE FOR OFFICE, WHETHER PRIVILEGED.** — Falsely imputing crime to a candidate for office is actionable: *Brenson v. Bruce*, 59 Mich. 467; 60 Am. Rep. 307, and note; extended note to *Banner Pub. Co. v. State*, 57 Am. Rep. 223-226.

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## TYLER v. HALL.

[106 MICHIGAN, 312.]

**ESTOPPEL — GRANTOR OF LAND ESTOPPED BY HIS DECLARATIONS AND DEED, WHEN.** — A person who conveys to another all the right, title, and interest that he inherited from his father in certain lands, declaring to his grantee, at the time of the conveyance, that a prior unrecorded deed of such lands from his father to him, containing restrictions on the alienation of his interest therein, had never been delivered to or accepted by him, will, in an action of ejectment brought against him by such grantee, be estopped by his declarations and deed from denying that his deed conveyed the estate in the land which he would have taken by inheritance, had no deed been made by his father to him.

**PLEADING ESTOPPEL NOT NECESSARY IN EJECTMENT, WHEN.** — It is a gen-  
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eral rule that an estoppel must be pleaded in order to be available as a defense, but this rule does not apply to ejectment suits in which the parties do not set up the title on which they rely.

**DELIVERY OF DEED, BURDEN OF PROOF OF, ON PARTY CLAIMING UNDER.**

— Where, in an action of ejectment, the evidence is, that the deed under which the defendant claims title from his father, the original source of title, was found by the administrator of the father, in a desk kept by the deceased and under his control, among other papers belonging to him at his death, and was afterwards given into the defendant's possession by the administrator, the burden of proving that the deed was delivered before the father's death is on the defendant.

**ATTORNEY AND CLIENT — CONFIDENTIAL COMMUNICATIONS BETWEEN — PRIVILEGE AS TO, NOT EXTENDED TO THIRD PERSONS.** — An attorney is not a competent witness to prove communications made to him professionally and confidentially, if the person making them claims the privilege, but this privilege does not extend to third persons who were present at a conference between attorney and client, and such third persons are competent witnesses, and can testify to such communications.

**DELIVERY OF DEED, WHAT NECESSARY TO CONSTITUTE VALID.** — To constitute a valid delivery of a deed, the dominion over the instrument must pass from the grantor with the intent that it shall pass to the grantee, if the latter will accept it, and no particular form or ceremony is essential to constitute a delivery; it may be made by acts or words, or by both. But so long as the delivery of a deed remains incomplete, a grantor can change his intention relating thereto, and destroy the deed if he so desires.

**INSTRUCTIONS, REFUSAL TO GIVE, NOT ERROR WHEN.** — When a court has already given instructions which state the law fully and fairly, it is not error to refuse to give other instructions to the same effect.

**EVIDENCE, COMMENT ON, SIMPLY STATING LEGAL EFFECT OF FACTS IS NOT.** — The simple statement by the court of the legal effect of facts in evidence is not a comment on the evidence. It is not, therefore, error for a court to instruct the jury that a deed left by the grantor in a place where it is accessible to the grantee does not constitute a delivery, in the absence of an intention on the part of the grantor to deliver and of the grantee to accept.

**POSSESSION OF LAND, INTENTION OF PARTY IN PUTTING ANOTHER IN, INFERENCES AS TO.** — Whether a deceased father placed his son in possession of land for the sole purpose of permitting him to enjoy the rents and profits, or in pursuance of a previous gift thereof to him, is a question of intention, to be inferred from the relations of the parties, their conduct and declarations, and all the facts and circumstances in evidence in the case.

*R. M. Robertson, M. A. Fyke, and O. L. Houts, for the appellants.*

*W. W. Wood and S. P. Sparks, for the respondent.*

**MACFARLANE, J.** The action is ejectment to recover a tract of land in Johnson County. The answer admitted the possession, and denied all other allegations.

Sylvester Hall, deceased, was the common source of title.

Previous to his death he owned the tract of land in controversy, and died seised of large tracts of land in Johnson and Pettis counties, leaving his widow and three children, George L. Hall being one of them. The widow took a child's part of the estate.

Plaintiff read in evidence a deed from defendant Hall to himself, dated the eighth day of August, 1885, describing therein about sixteen hundred acres of land, and including the land in controversy. This was in form a deed of general warranty, and described the interest conveyed as follows: "The following described tracts or parcels of land, situate in the county of Johnson and state of Missouri, to wit, all my present right, title, and interest, which I inherited from my father, Sylvester Hall, late of Pettis County, Missouri, as one of his three children and heirs at law in and to," following with a description of the lands conveyed. After the specific description, the following: "Also, all other real estate not hereinbefore described specifically, whether in said county of Johnson, or any other county in the state of Missouri, which I inherited from my said father, Sylvester Hall." This deed was duly acknowledged and recorded.

Plaintiff then put in evidence the record of a partition suit between plaintiff and the heirs of Sylvester Hall, by which the land in suit was set off in severalty to himself.

Defendant, in support of his title, offered an unrecorded deed from Sylvester Hall, dated July 30, 1881, conveying the land in suit to him for life, with remainder to the heirs of his body. This deed contained the following provision: "But under this conveyance, etc., said George L. Hall is to have no power to sell or convey his life estate in said lands, or any part thereof; and if the said George L. Hall shall, at any time hereafter, convey, or attempt to convey, his life interest, or any part thereof in the lands hereby conveyed, or any portion of the same, then this deed shall become immediately void and of no effect." Under this deed defendant claimed title, and the right to the possession of the whole of the land in suit.

1. Plaintiff testified, and his testimony was undisputed, that defendant informed him, when he sold him his interest in the estate inherited from his father, that this deed from his father had never been delivered to or accepted by him. The court held that under the deed from defendant to plaintiff, and the representations so made, defendant was estopped to deny that the deed to plaintiff conveyed such an interest in the land as he would have taken by inheritance, had no deed been made

by his father to him. The ruling of the court was undoubtedly correct. The deed from defendant to plaintiff not only undertook to convey all the interest in the estate inherited from his father, but the recitals therein plainly declared that the land in controversy was a part of the estate so inherited. The rule is, that a recital in a deed of a fact will, in general, conclude the grantor and his privies: *Dickson v. Anderson*, 9 Mo. 156; *Clamorgan v. Greene*, 32 Mo. 285; *Bailey v. Trustees*, 12 Mo. 176.

"In order to determine whether a recital is evidence in a given case against a party, we have only to ascertain whether an acknowledgment or confession of the person who executed the deed would be competent": *Joeckel v. Easton*, 11 Mo. 124; 47 Am. Dec. 142.

2. It is insisted that plaintiff cannot avail himself of the estoppel in this case, for the reason that it was not pleaded. It is true, generally, that an estoppel must be pleaded in order to be available as a defense, but the rule does not apply to ejectment suits in which the parties do not set up the title on which they rely. The pleadings in this class of cases are not required to give notice to the opposite party of the title upon which reliance is placed. Plaintiff was not informed by the pleadings that defendant would rely upon a deed from his father, and had no opportunity to plead thereto, and was not required to do so: *Alexander v. Campbell*, 74 Mo. 143.

3. The principal contest in this case was over the question as to whether there had been a delivery of the deed from Sylvester Hall to defendant. The verdict was against the defendant for the whole of the land, and necessitated a finding by the jury that there was no delivery of this deed. If the trial of this issue was fair and without error, other questions become unimportant.

After the death of Sylvester Hall, the deed in question was found by the administrator, in a desk kept by deceased and under his control, among other papers belonging to him at his death. It was afterwards given into the possession of defendant by the administrator. The court instructed the jury that under this state of facts the burden of proving a delivery was on the defendant. The delivery of a deed is as essential to its validity as any other of the necessary acts. A party claiming under a deed is bound to prove its execution and delivery. The deed must have been complete before the death of the grantor. The burden of showing this was on

the defendant, who claimed under the deed. If the deed, properly executed, had, on the death of the grantor, been in the possession of the grantee, a presumption of delivery would have arisen, which could only have been overcome by satisfactory evidence: *Scott v. Scott*, 95 Mo. 800. The administrator had no power to complete it by delivery. The question was, in whose possession was the deed at the time of the death of the grantor, and not at some subsequent period. The instruction correctly declared the law.

4. The administrator testified that after he had taken charge of the estate, in company with defendant, he consulted his attorney in regard to the deed and his duties in respect to it, and in that interview, defendant had informed the attorney, after being questioned, that he had never seen the deed prior to his father's death, and that it had never been delivered to him. The administrator paid his counsel for this consultation, but required defendant to repay him. This testimony was objected to by defendant, on the ground that the communication to the attorney was privileged. Under our statute, section 8925, which is a mere affirmation of the common law, an attorney is not a competent witness to prove communications made to him professionally and confidentially, if the person making them claims the privilege. This privilege, however, does not extend to third persons who were present at a conference between attorney and client, and such third persons are competent witnesses, and can testify to such communications. The rule of common law confined the privilege to counsel and the media of communication between client and counsel as clerk, interpreter, etc., and this rule has not been enlarged by the statute: *Jackson v. French*, 8 Wend. 339; 20 Am. Dec. 699; *Hoy v. Morris*, 18 Gray, 520; 74 Am. Dec. 650; *Goddard v. Gardner*, 28 Conn. 174.

5. The only remaining question is, whether the court properly instructed the jury on the question as to whether the deed was delivered to defendant by his father, the grantor, prior to his death. The evidence on this question was conflicting. It shows, however, without conflict, that after the death of Sylvester Hall, the deed was found by the administrator, in a desk, among the papers of deceased, in an old envelope marked in pencil across the back, "Geo. L. Hall's deeds and Charlie Hall's deeds." In the same envelope were also a deed to Charles U. Hall to another tract of land, an abstract of title, and some tax receipts. Defendant and other members of the

family of deceased had access to this desk. Sylvester Hall died in the spring of 1885. In the winter preceding his death, he had put defendant in possession of the land. The other evidence of delivery consisted principally of declarations of deceased to the effect that he had given the land to defendant, and the evidence tending to prove want of delivery consisted chiefly in the testimony of witnesses detailing admissions made by defendant that the deed had not been delivered. There was also evidence tending to prove that the grantor handed the deed to defendant, and told him to have it recorded. Defendant insists that upon the evidence the jury should have been peremptorily instructed to find in his favor.

To constitute a valid delivery, the dominion over the instrument must have passed from the grantor with the intent that it shall pass to the grantee, provided the latter accept: 2 Greenl. Ev., sec. 297. Hence it was held in *Huey v. Huey*, 65 Mo. 689, that "the mere lodgment of a deed properly executed and acknowledged by the grantor in a place to which the grantee has access, and from which he can without hindrance transfer it to his own possession, with the intent on the part of the grantor that the grantee may, after his death, take it and have it recorded, and then become the owner of the land, does not constitute delivery of the deed": *Scott v. Scott*, 95 Mo. 300. The execution and acknowledgment of this deed, and putting the grantee in possession of the land alone, only constitute evidence that, at the time these acts were done, the grantor intended a future delivery, provided the grantee should accept. So long as the delivery remained incomplete the grantor had the right to change his intentions, and if he saw fit, to destroy the deed. The undisputed facts, we think, did not authorize the peremptory instruction asked.

6. The court, at the request of defendant, gave the jury the following instruction: "The court instructs the jury that no particular form or ceremony is necessary to constitute a delivery of a deed; it may be by acts or words, or both. Anything which clearly manifests the intention of the grantor and the person to whom it is made that the deed shall then become operative and effectual, that the grantor shall lose all control over it, and that by it the grantee is to become possessed of the estate embraced in such deed, is a sufficient delivery. If the jury believe, therefore, from the evidence that Sylvester Hall, having signed and acknowledged the deed to George L. Hall, offered in evidence, handed the same to said

George L. Hall, and told him to put said deed on record, or words to that effect, and that George L. Hall accepted said deed, then such acts and words constitute a delivery of said deed; and you will so find."

This instruction declares the law relating to the delivery of deeds very favorably to defendant, and in accordance with the principles declared and approved by this court in the following and probably other decisions: *Huey v. Huey*, 65 Mo. 689; *Turner v. Carpenter*, 83 Mo. 336; *Miller v. Lullman*, 81 Mo. 314; *Scott v. Scott*, 95 Mo. 300.

7. The court also, on its own motion, instructed the jury that if the grantor handed the deed to defendant, "and told him to have it recorded, or by words or acts, or by both words and acts, transferred the control of the deed to defendant, and it was accepted by him," then the delivery was complete, although "the deed was left in the possession of the grantor, and was found by the administrator with his papers after his death." These instructions presented the law of the case fully and fairly to the jury, and a refusal to give other instructions to the same effect, though differently worded, did not constitute error: *Brown v. Hannibal etc. R'y Co.*, 99 Mo. 319.

8. The court, at request of plaintiff, instructed the jury that though "Sylvester Hall during his lifetime kept the deed in a place to which George L. Hall had access, yet that fact, of itself, was not sufficient to constitute delivery. The intention to deliver must be proven by some word or act of the grantor."

It is insisted that this instruction was a comment on the evidence, and was therefore improper. It is always proper for the court to declare to the jury the legal effect of the facts in proof. The very purpose of instructions is to advise the jury as to the legal effect of the evidence. The fact that the deed was left by the grantor in a place accessible to defendant did not, as has been seen, constitute a delivery, in the absence of an intention on the part of the grantor to deliver, and of the grantee to accept it. To simply declare this legal effect was not a comment on the evidence.

9. The court also instructed the jury that if Sylvester Hall put defendant in possession of the land for the sole purpose of permitting him to enjoy the rents and profits thereof, and not in pursuance of making a previous gift of same, then such possession was "not evidence of the delivery of the deed." It

is insisted that this instruction was improper, for the reason that there was no evidence that Sylvester Hall put defendant in the possession for the sole purpose of permitting him simply to enjoy the rents and profits.

It is true, there is no direct evidence of the intention of Sylvester Hall in giving defendant, his son, possession. The intention can, however, be inferred from the relation of the parties to each other, the conduct and declarations of each, and all the facts and circumstances in evidence. It cannot be said that these did not tend to prove the intention. If the deed had been previously delivered, defendant had the legal right to go on the land and cut the timber without the consent of his father, and the declarations of the father in evidence to the effect that he wanted George to live on the place, and he could do as he pleased about cutting the timber, was inconsistent with ownership by the son, and is only consistent with a desire that he should merely "enjoy the rents and profits" under such possession.

No error appearing, the judgment is affirmed.

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**ESTOPPEL, MODE AND NECESSITY OF PLEADING — NECESSITY OF PLEADING**  
**ESTOPPEL.** — The question whether or not it is necessary to plead an estoppel, in order to make it available, is one upon which there has existed a great contrariety of judicial opinion. It seems to be quite impossible to reconcile the earlier common-law authorities on this question. It is believed, however, that in this country the great weight of modern authority, particularly in what are termed the code states, where parties to an action are required to state the facts constituting their cause of action or ground of defense in their pleadings, has firmly established the rule that estoppels, to be available on the trial, must be specially pleaded where there has been an opportunity for so pleading them: *Pomeroy on Remedies and Remedial Rights*, 2d ed., sec. 712; *Clarke v. Huber*, 25 Cal. 593; *Davis v. Davis*, 26 Cal. 23; 85 Am. Dec. 157; *Etcheborne v. Amerais*, 45 Cal. 121; *McKeen v. Naughton*, 88 Cal. 462; *De Votie v. McGerr*, 15 Col. 467; 22 Am. St. Rep. 426; *Gaynor v. Clements*, 16 Col. 209; *Maxwell v. Longenecker*, 89 Ill. 102; *Wood v. Ostram*, 29 Ind. 177; *Robbins v. Magee*, 76 Ind. 331; *Stine v. City of Frankfort*, 79 Ind. 446; *Anderson v. Hubble*, 93 Ind. 570; 47 Am. Rep. 394; *City of Dephi v. Startman*, 104 Ind. 343; *Ransom v. Standberry*, 22 Iowa, 334; *Ind. Dist. of Burlington v. Merchants' Nat. Bank*, 68 Iowa, 343; *Phillips v. Van Shaick*, 37 Iowa, 229; *Dwelling-house Ins. Co. v. Johnson*, 47 Kan. 1; *Heirs of Wood v. Nicholls*, 33 La. Ann. 744; *Dale v. Turner*, 34 Mich. 405; *Bray v. Marshall*, 75 Mo. 227; *Noble v. Blount*, 77 Mo. 235; *Hammerslough v. Oheatham*, 84 Mo. 13; *Burlington & M. R. R. Co. v. Harris*, 3 Neb. 140; *Hanson v. Ohiatovich*, 13 Nev. 395; *Tallman v. Varick*, 5 Barb. 277; *Brazill v. Isham*, 12 N. Y. 9; *Krekeler v. Ritter*, 62 N. Y. 372; *Dresler v. Hard*, 57 N. Y. Sup. Ct. 192; *Fanning v. Insurance Co.*, 37 Ohio St. 344; *Meiss v. Gill*, 44 Ohio St. 253; *Rugh v. Ottenheimer*, 6 Or. 231; 25 Am. Rep. 513;



*Turley v. Turley*, 85 Tenn. 251; *Jourdon v. Massengill*, 86 Tenn. 81; *Gray v. Piggry*, 17 Vt. 419; 44 Am. Dec. 345; *Gill v. Rice*, 18 Wis. 549; *Waddle v. Merrill*, 26 Wis. 611; *Warder v. Baldwin*, 51 Wis. 450; 2 Herman on Estoppel, sec. 1304. In *De Votis v. McGerr*, 15 Col. 467, 22 Am. St. Rep. 426, Elliott, J., delivering the opinion of the court, said: "But whatever may be the weight of common-law precedents upon this subject, reason, logic, and the general current of authority in the code states concur in the rule that estoppels must be specially pleaded, and this rule includes estoppels *in pais*, as by fraudulent conduct, and the like." Phillips, O., delivering the opinion of the court in *Hammerslough v. Cheatham*, 84 Mo. 21, said: "It is the settled rule of this court that an estoppel *in pais* must be pleaded by the party seeking to avail himself of it." In *Dwelling-house Ins. Co. v. Johnson*, 47 Kan. 5, Johnston, J., delivering the opinion of the court, said: "It is uniformly held that a waiver or estoppel must be specially pleaded before evidence to establish the same can be admitted. Under our code, the facts relied upon as a ground of action or defense must be clearly and concisely stated and a definite issue presented, so that the opposite party may not be taken by surprise upon the trial, but may be fairly notified of what he is required to meet." Currey, J., delivering the opinion of the court in *Davis v. Davis*, 26 Cal. 39, 85 Am. Dec. 157, said: "But equitable estoppels *in pais*, generally if not universally, are applied to prevent injury which would ensue to one from the acts or declarations of another, were he permitted to gainsay the truth of such acts and declarations. The principle is invoked and applied for the prevention of fraud, or that which is tantamount thereto, on the one side, and injury on the other; and it is but just, and is in accordance with the rules of pleading in equity cases, that the party relying upon an equitable estoppel *in pais* should inform the adverse party of the nature of the cause of action or defense which he will be obliged to meet. To do this he must plead it with the same fullness and particularity as is required in cases involving like subjects of inquiry in suits of equity." And Johnson, J., in delivering the opinion of the court in *Fanning v. Insurance Co.*, 37 Ohio St. 346, said: "The former adjudication is new matter, which the code practice requires should be pleaded. It is matter *ex post facto*, and should be specially pleaded, so that the court may, as matter of law, determine as to its effect. This was the settled rule at common law whenever there was an opportunity to plead such former adjudication. The code having furnished that opportunity to plead it, we think the record was inadmissible as evidence."

On the other hand, there are authorities which hold that estoppels, and particularly estoppels by matters *in pais*, of which courts of law will take cognizance, can be relied upon in evidence without being pleaded: Bigelow on Estoppel, 5th ed., 699; *Freeman v. Cooke*, 2 Ex. 654; *Caldwell v. Auger*, 4 Minn. 217; 77 Am. Dec. 515; *Coleman v. Pearce*, 26 Minn. 123; *Turnispeed v. Hudson*, 50 Miss. 429; 19 Am. Rep. 15; *Welland Canal Co. v. Hathaway*, 8 Wend. 480; 24 Am. Dec. 51; *Lites v. Addison*, 27 S. O. 227; *Mayer v. Ramsey*, 46 Tex. 371.

**ESTOPPEL MAY BE GIVEN IN EVIDENCE WHERE NO OPPORTUNITY HAS BEEN GIVEN TO PLEAD IT.**—The rule requiring an estoppel to be pleaded does not apply in cases where there has been no opportunity given to plead it. In such cases it is admissible in evidence with the same conclusive effect as if it had been pleaded: Bigelow on Estoppel, 5th ed., 698, note; 2 Herman on Estoppel, sec. 1266; 1 Freeman on Judgments, 4th ed., sec. 283; *Flandreau v. Downey*, 23 Cal. 354; *Olink v. Thurston*, 47 Cal. 21; *Campbell v. Goodall*, 8 Ill. App. 276; *Phillips v. Blair*, 33 Iowa, 649; *Towne v. Sparks*, 23 Neb. 142; *Wood v.*

*Jackson*, 8 Wend. 9; 22 Am. Dec. 603; *Knight v. Mutual L. Ins. Co.*, 14 Phila. 187; *Mayer v. Ramsey*, 46 Tex. 371; *Guest v. Guest*, 74 Tex. 664; *Lord v. Bigelow*, 8 Vt. 445; *Isaac v. Clark*, 12 Vt. 692; 36 Am. Dec. 372; *Hayes v. Virginia M. P. Ass'n*, 76 Va. 225; *Carroll County v. Collier*, 22 Gratt. 302; *Davis v. Thomas*, 5 Leigh, 1; *Gans v. St. Paul F. & M. Ins. Co.*, 43 Wis. 108; 28 Am. Rep. 535. Where a plaintiff in bringing his action declares generally upon the common counts, he gives to the defendant no notice whatever of the nature of his claim against him. He conceals rather than discloses the true cause of action, and affords the defendant no opportunity to plead specially. In such case the defendant may plead the general issue, and may introduce under it any evidence to meet the case made by the plaintiff in his evidence: *Campbell v. Goodall*, 8 Ill. App. 266. In Nebraska, it is held that in replevin evidence of matter in estoppel may be given and availed of as a defense under a general denial, and without being pleaded specially: *Towne v. Sparks*, 23 Neb. 142. In delivering the opinion of the court in that case, Cobb, J., said: "While it cannot be denied that in general an estoppel, to be available, must be pleaded, I do not think that the rule applies to actions of replevin under our system. It is settled law applicable to such cases, that under a general denial evidence may be admitted tending to prove the detention of the replevied goods to have been lawful." In Virginia, it is held that an estoppel may be given in evidence by the plaintiff when the defense is the general issue, because in such case the estoppel cannot be pleaded; but when the matter to which the estoppel applies is specially pleaded, a replication of estoppel is necessary: *Hayes v. Virginia M. P. Ass'n*, 76 Va. 225; *Carroll County v. Collier*, 22 Gratt. 302; *Davis v. Thomas*, 5 Leigh, 1. See also *Knight v. Mutual L. Ins. Co.*, 14 Phila. 187. And in states where a replication is not allowed by the code, proof of facts which estop the defendant from setting up a certain defense is admissible: *Waddle v. Morrill*, 26 Wis. 611; *Gans v. St. Paul F. & M. Ins. Co.*, 43 Wis. 108; 28 Am. Rep. 535. So in those states where special pleading has been abolished, estoppels are conclusive in evidence, although not pleaded: 2 Herman on Estoppel, sec. 1274. In an action of ejectment, an estoppel may be given in evidence under the general issue, without being pleaded: *Wood v. Jackson*, 8 Wend. 9; 22 Am. Dec. 603; *Phillips v. Blair*, 38 Iowa, 649. In 1 Freeman on Judgments, 4th ed., sec. 283, it is said: "Both by the common law and the codes of procedure in force in many of the states, if a plaintiff sues for the possession of property, real or personal, without disclosing the nature or source of his claim of title, the defendant is not obliged to anticipate and understand it, and plead such judgment estoppels as may exist against it. When it is disclosed at the trial, he may, under the general issue, establish any judgment or other estoppel which may exist in his favor"; citing *Flundreau v. Downey*, 23 Cal. 358; *Jackson v. Lodge*, 36 Cal. 38; *Grum v. Barney*, 55 Cal. 254; *Young v. Rummell*, 2 Hill, 481; 38 Am. Dec. 594; *Miller v. Manice*, 6 Hill, 131. In *Olink v. Thurston*, 47 Cal. 21, it was held that an allegation of an estoppel by former judgment has no place in a complaint in ejectment. Niles, J., in delivering the opinion in that case, said: "Under no recognized system of pleading could it be properly presented in the complaint." So also, in an action of trespass to try title, under the plea of "not guilty," evidence of an estoppel is admissible without special plea: *Mayer v. Ramsey*, 46 Tex. 371; *Guest v. Guest*, 74 Tex. 664. But in *Remillard v. Prescott*, 8 Or. 37, it was held that where parties claim title by estoppel, and intend to rely on such title, they should plead it in the complaint, when an opportunity to do so is given.

**EFFECT OF FAILURE TO PLEAD ESTOPPEL.** — If a party who has an oppor-

tunity to plead an estoppel upon which he relies fails to do so, but goes to issue on the fact, he thereby waives the estoppel, puts the matter at large, and the jury may disregard the estoppel, and are at liberty to find the truth: 2 Herman on Estoppel, sec. 1261; *Vooght v. Winch*, 2 Barn. & Ald. 662; *Doe v. Huddart*, 2 Oromp. M. & R. 316; *Feverham v. Emerson*, 11 Exch. 385; *Young v. Ruincock*, 7 Com. B. 310; *Davis v. Davis*, 26 Cal. 23; 85 Am. Dec. 157; *Parli-man v. Young*, 2 Dak. 175; *Cooley v. Brayton*, 16 Iowa, 10; *Howard v. Mitchell*, 14 Mass. 241; *Kilheffer v. Herr*, 17 Serg. & R. 319; 17 Am. Dec. 658.

**MODE OF PLEADING ESTOPPEL.** — Pleadings in estoppel must be certain in every particular. Estoppels must be pleaded with great particularity and precision, leaving nothing to intendment. Since an estoppel forbids a party to plead the truth, it should be set out with more certainty than will avail in ordinary defenses: Stephen on Pleading, 353; Bliss on Code Pleading, 2d ed., sec. 364; *Gilbreath v. Jones*, 66 Ala. 129; *Anderson v. Hubble*, 23 Ind. 570; 47 Am. Rep. 394; *Robbins v. Magee*, 76 Ind. 381; *Ashley v. Foreman*, 85 Ind. 55; *Stewart v. Beck*, 90 Ind. 458; *Troyer v. Dyar*, 102 Ind. 396; *Noble v. Blount*, 77 Mo. 235; *Texas Banking Co. v. Hutchins*, 53 Tex. 61; 37 Am. Rep. 730; *Gray v. Pingry*, 17 Vt. 419; 44 Am. Dec. 345; *Warder v. Baldwin*, 51 Wis. 450.

But although technical estoppels must be pleaded with great strictness, when a former judgment is set up in bar of a pending action, or as having determined the entire merits of the controversy involved in the second suit, it is not necessary that it should be pleaded with any greater strictness than any other plea in bar, or any plea in avoidance of the matters alleged in the antecedent pleading. Reasonable certainty in such a case is all that is required: 2 Freeman on Judgments, 4th ed., sec. 460; 2 Herman on Estoppel, sec. 1282; *Aurora v. West*, 7 Wall. 82; *Blake v. Burley*, 9 Iowa, 592; *Gray v. Pingry*, 17 Vt. 419; 44 Am. Dec. 345; *Perkins v. Walker*, 19 Vt. 144. In pleading a judgment as an estoppel to an action, it must be shown that precisely the same matter was in issue at the former trial, and that the judgment was rendered on the merits: Bigelow on Estoppel, 5th ed., 702; *Gilbreath v. Jones*, 66 Ala. 129; *Temple v. Williams*, 91 N. C. 82; *Bryan v. Malloy*, 90 N. C. 508; *Russell v. Place*, 94 U. S. 606. In equity, when a judgment is relied upon as an estoppel, it must be set up by proper averments, either in the bill or answer, or by separate plea. It is not sufficiently pleaded unless so much of the former proceedings are set out as will clearly show that the issues in the former and in the pending case are identical: *Jourolmon v. Massengill*, 86 Tenn. 81; *Turley v. Turley*, 85 Tenn. 251. In all cases where the record gives no intimation whether a particular matter was determined or not, or where the language used leaves it uncertain or open to conjecture, the party relying on the estoppel must aver the fact, and support it by evidence *aliunde*: *Fowlkes v. State*, 14 Lea, 14. In that case it was said that a plea or replication of a former judgment would be bad on demurrer, which failed to show whether the judgment was or was not on the merits, but that this may be done either by averment or by setting out the judgment *in hoc verba*, if the judgment itself states facts which plainly supply the averment. If upon the face of a record anything is left to conjecture, as to what was necessarily involved and decided, there is no estoppel in it when pleaded: *Russell v. Place*, 94 U. S. 606; *Aiken v. Peck*, 22 Vt. 255; *Hooker v. Hubbard*, 102 Mass. 239.

In an action of trover for the conversion of chattels, a plea of former recovery in detinue, which fails to allege that the question of ownership entered into the issue on the former trial, and was then decided, and which

fails to negative the idea that the recovery in that case was because of a failure to prove the defendant's possession, is fatally defective; and if a deceased defendant in the action of trover, as to whom the action has abated, was the defendant in the detinue suit, the plea is fatally defective, because the parties are not the same: *Gilbreath v. Jones*, 66 Ala. 129. So in detinue for a slave, a plea in bar of the further maintenance of the suit, setting up a recovery by the defendant against the plaintiff in a subsequent action of *assumpsit* for the hire of the slave, is fatally defective on demurrer, unless it shows that the question of ownership entered into the issue on that trial; an averment that the declaration in that suit alleged that the plaintiff therein was the owner of the slave is not sufficient, because the recovery might have been had under a bailment, which would have rendered the allegation of ownership immaterial: *Chamberlain v. Gaillard*, 26 Ala. 504.

In order to bring the estoppel of a judicial decision to bear upon a point which it does not directly adjudge, great certainty of allegation is required. On this subject Herman says: "The proper course is to plead the judgment specially, fortifying it with the averments necessary to supply the vagueness of the record, and show that the precise question which is again agitated has been already determined": 2 Herman on Estoppel, sec. 1285.

A plea of judgment recovered in a foreign court of competent jurisdiction must show that the judgment so recovered is final and conclusive between the parties according to the law of the place where such judgment was pronounced: *Frayes v. Worms*, 10 Com. B., N. S., 149; *Phummer v. Woodburns*, 4 Barn. & C. 625; 2 Herman on Estoppel, sec. 1289.

**PLEADING ESTOPPEL BY CONDUCT.** — An answer setting up an estoppel by conduct must show that the defendant relied upon the plaintiff's representations or conduct, was influenced thereby, and was ignorant of the truth: *Robbins v. Magee*, 76 Ind. 381. It is error to overrule a demurrer to an answer of estoppel which fails to show that the plaintiff had knowledge of the facts constituting the estoppel, and which does show that the defendant had knowledge of all such facts: *Long v. Anderson*, 62 Ind. 537; *Buck v. Milford*, 90 Ind. 291. But where an answer sets up the substantial facts relied on as an estoppel, and asserts that by reason of such facts the plaintiff is estopped, the estoppel is sufficiently pleaded: *Olden v. Hendrick*, 100 Mo. 533. And in *Barnhart v. Fulberth*, 90 Cal. 157, it was held that, in an action of replevin against a sheriff, an answer which alleges justification under writs of attachment and execution, and avers that the levy was made in sole reliance upon the statement of the plaintiff that he held possession of the property as the pledgee of the execution debtor, who was the owner thereof, sufficiently pleads an estoppel under section 1962, subdivision 3, of the California Code of Civil Procedure. It is not sufficient, however, to allege the acts and representations relied on as an estoppel merely upon information and belief: *Jones v. Cowles*, 26 Ala. 612; *Read v. Walker*, 18 Ala. 323; *McDowell v. Graham*, 3 Dana, 73; Bigelow on Estoppel, 711. A plea of estoppel by misrepresentation ought to show that the party sought to be estopped made the misrepresentation knowing it to be false, for the purpose of influencing the conduct of the pleader, who, believing it to be true, acted upon it, and that he will be prejudiced by permitting the truth of the admission or representation to be disproved: *Plumb v. Cattaraugus M. I. Co.*, 18 N. Y. 392; 72 Am. Dec. 526; *Brown v. Bowen*, 30 N. Y. 519; 86 Am. Dec. 406; *Danell v. Odell*, 3 Hill, 215; 28 Am. Dec. 628; Bigelow on Estoppel, 709. Where the fact that concludes a defendant from making the denial appears in the declaration, the estoppel may be insisted upon by a demurrer to the plea by which the same matter is set

up as a defense: *Smith v. Whitaker*, 11 Ill. 417; *Greenup v. Crooks*, 50 Ind. 410. But if the matter of estoppel does not appear in the declaration, the plaintiff must, by a replication to the plea, expressly show such matter and rely thereon: *Smith v. Whitaker*, 11 Ill. 417. It is not, however, necessary for the plaintiff to reply, setting up the facts constituting an estoppel, when they appear affirmatively by the answer: *Scott v. Luther*, 44 Iowa, 570; *Lee v. Summers*, 2 Or. 280.

**FORM OF PLEA OF ESTOPPEL.** — A plea of estoppel must have a formal commencement and conclusion, to mark its special character and quality, and to distinguish it from an ordinary plea in bar: *City of N. St. Louis v. Flannigan*, 34 Ill. App. 596; *Whittemore v. Stephens*, 48 Mich. 573; 2 Herman on Estoppel, sec. 1275. And pleas of estoppel must rely upon the estoppel in conclusion: *Gray v. Pingry*, 17 Vt. 419; 44 Am. Dec. 345; *City of N. St. Louis v. Flannigan*, 34 Ill. App. 596. The formal commencement of such plea is: "Says that said plaintiff ought not to be admitted to say," etc., and of the conclusion is, "Wherefore he prays judgment, if the said plaintiff ought to be admitted against his own acknowledgment, by his deed aforesaid" (or otherwise, according to the manner of the estoppel) "to say that," etc. (stating the allegation to which the estoppel relates). The commencement of a replication by way of estoppel is: "Says that the said defendant ought not to be admitted to plead the said plea by him above pleaded, because he says," etc.; and its conclusion is, "Wherefore he prays judgment if the said defendant ought to be admitted to his said plea contrary to his own acknowledgment, etc., and that he may answer over," etc. The following plea and replication were pleaded in the case of *Langmead v. Maple*, 18 Com. B., N. S., 255.

To a declaration for an injury to the plaintiff's reversion, the defendant pleaded that the plaintiff ought not to be permitted to implead him in respect to those causes of action, because, after their accrual, and after the passing of the chancery regulation act, the plaintiff commenced his suit and filed his bill in chancery against him, and impleaded him therein for the very same rights, claims, and causes of action as in the declaration alleged; and that such proceedings were thereupon had that the court of chancery determined the same alleged causes of action in favor of the defendant, and gave judgment and decreed in respect thereof in favor of the defendant; and that the said judgment and decree still remained in force. This was held to be a good plea by way of estoppel, notwithstanding the objection thereto that it was not specific enough in the statement of the issue in the trial in chancery, and the contention of counsel that it was necessary to show that the matter did in fact come in issue, and that it was not enough to show that it might have come in issue. To this plea the plaintiff replied that he ought to be permitted to implead the defendant in respect to the causes of action in the declaration alleged, because he said that the court of chancery, in dismissing his bill, reserved to him the right of proceeding at law for the causes of action in the declaration alleged, and ordered his bill to be dismissed without prejudice to his right. This replication was also held good.

## REYBURN v. MITCHELL.

[106 MISSOURI, 365.]

**PARTNERSHIP PROPERTY, HOW APPLIED TO PAYMENT OF DEBTS. —** One partner cannot transfer the partnership property for the satisfaction of his individual debt without the consent or acquiescence of the other partners, for each partner has the right, in equity, to have the property of the firm applied to the payment of the partnership debts. And as the firm creditors derive the right to have the partnership assets appropriated to the satisfaction of their debts in preference to creditors of the individual partners through these equities among the partners themselves, such right can only exist so long as the partnership itself continues, and consequently a *bona fide* waiver of their equitable rights by the partners cuts off the derivative equities of the creditors.

**PRIORITY OF PARTNERSHIP CREDITORS NOT OVERREACHED BY MORTGAGE OF PARTNERSHIP PROPERTY BY ONE PARTNER, WHEN. —** A mortgage of his right, title, and interest in partnership property, made by an individual partner to secure an antecedent debt of his, though with the consent of the other partners, will not overreach the general lien of the partners, or the priority of partnership creditors.

**TRANSFER BY INSOLVENT PARTNERSHIP OF ALL ITS ASSETS AFTER DISSOLUTION VOID AS AGAINST ITS CREDITORS, WHEN. —** Although after the dissolution of a partnership, even though made insolvent by the sale and transfer of all its assets, the creditors cannot, as a general rule, follow the property into the hands of the purchaser, yet this is true only where the transaction has been in good faith, and not for fraudulent purposes. If such transfer is fraudulent, it is void, does not affect the rights of the partnership creditors, and does not place the property beyond their reach.

**TRUST ESTATE OF TRUSTEE OF EXPRESS TRUST DESCENDS TO HIS PERSONAL REPRESENTATIVE. —** Upon the death of a trustee of an express trust of personal property, the trust estate descends to his personal representative, and an action affecting the trust estate, pending in his own name at the time of his death, may be revived and prosecuted in the name of his executor or administrator, where it does not appear that a successor has been agreed upon or appointed.

**EQUITY — CREDITOR BOUND TO REDUCE HIS DEBT TO JUDGMENT BEFORE INVOKING. —** As a general rule, before a creditor can invoke the aid of a court of equity, he must reduce his debt to judgment, and exhaust his legal remedies, but where a number of the demands held by a plaintiff, who is the assignee of the creditors, have been reduced to judgment, the court thereby acquires jurisdiction of the subject-matter, and may proceed to do full and complete justice between the parties, and dispose of the whole matter before it.

**JUDGMENT, ACCEPTANCE OF NOTE OF PARTNER FOR, NOT RELEASE OF PARTNERSHIP, WHEN. —** The release of a judgment against a firm, and the acceptance of the individual note of one of the partners, does not release the partnership from liability, in the absence of any proof that he intended to release it.

**PLEADINGS, AMENDMENT OF, SHOULD BE ALLOWED, WHEN. —** It is proper to permit a petition to be amended so as to make it correspond with changes that have occurred since the commencement of the suit, and to allow



new parties to be brought in who have become interested in the property in controversy.

**ESTOPPEL—CREDITOR NOT ESTOPPED BY CLAIMING SURPLUS IN FORECLOSURE, WHEN.** — A creditor, by claiming a surplus arising from the foreclosure of a deed of trust, will not be estopped from questioning its validity, on the ground that it was made in fraud of creditors, when the objection is raised by one who was a party to the fraud.

**SUBROGATION, CREDITOR ENTITLED TO, WHEN.** — A creditor who, in order to preserve his own security, is compelled to pay a prior encumbrance, held by another creditor, will be subrogated to the rights of such creditor, to the extent necessary for his own protection.

*D. P. Dyer*, for the appellants.

*Valle Reyburn and Joseph S. Laurie*, for the respondent.

**MACFARLANE, J.** (This is a suit by plaintiff, as administrator of the trustee of certain creditors of a dissolved partnership, composed of Mitchell and Robertson, to subject to the payment of their debts certain property, formerly held by the partnership, but which had been transferred to defendant Kilgour, an individual creditor of Mitchell, for the satisfaction or security of his debts.

About the 1st of September, 1881, Mitchell and Robertson entered into a partnership. At the time, Mitchell owned a thirty years' lease upon a lot in the city of St. Louis, upon which the People's Theater was situated. The lease was in the name of Mitchell, and the theater had been built for him during the year, under the direction and supervision of Robertson, who had advanced a part of the money therefor. On the 15th of September, 1881, in settlement for the money advanced, Mitchell conveyed to Robertson an undivided one third of this property, the express consideration being thirty-five thousand dollars. This leasehold and buildings constituted all the property of the firm. Previous to the formation of this partnership, defendant Kilgour had loaned to Mitchell, at different times, sums which then aggregated twenty-five thousand dollars, about twenty-three thousand dollars of which had also been used in the construction of the theater.

On the 23d of September, 1881, Mitchell made to Kilgour a mortgage on all his "right, title, and interest" in said property, to secure the twenty-five thousand dollars indebtedness due to him. This deed was not recorded until May, 1883, and Robertson had no notice of it until then.

On the 18th of October, 1882, Mitchell and Robertson made a deed of trust to Wolf and Capin to secure a partnership debt



for thirty-five thousand dollars for money borrowed from defendant Rea. This deed was at once recorded.

April 28, 1883, Mitchell made to his mother, Rebecca Mitchell, a mortgage on his "right, title, and interest" in the property, to secure a note for an individual indebtedness to her for ten thousand dollars. This note was subsequently assigned to Kilgour.

During the partnership, the firm borrowed considerable sums of money from the Franklin Bank of Cincinnati, by means of the accommodation indorsement of Kilgour. At the dissolution, this indebtedness remaining unpaid amounted to two thousand to four thousand dollars.

In June, 1882, in settlement of partnership balances, Mitchell conveyed to Robertson an additional one sixth of the property, thus making their interests equal.

The firm having become largely indebted, some of the debts having been reduced to judgments, and being unable to pay on June 17, 1884, Robertson conveyed by quitclaim deed to Mitchell, and on the fifth day of June, 1884, Mitchell conveyed by quitclaim deed to Kilgour; the former of these deeds was recorded July 22, 1884, and the latter the next day.

Under the contract of sale by Robertson to Mitchell, the latter assumed the payment of the partnership debts. The additional consideration was nine thousand dollars, which was divided into four notes of eighteen hundred dollars each, which Kilgour indorsed. Prior to the delivery of the deed from Robertson to Mitchell, the judgments standing against the partnership and against Robertson individually had been satisfied.

By this suit the creditors of the firm of Mitchell and Robertson undertake to subordinate the mortgages and interest of Kilgour to the payment of their debts. The various creditors assigned their debts to Samuel Colville, in whose name the suit was commenced. Colville having died, the suit was revived in the name of his administrator, in whose name it has since been prosecuted.

The suit was commenced against Mitchell, Kilgour, and Mrs. Mitchell. Pending the suit, the property was sold by the trustees under the Rea deed of trust, and Kilgour purchased at forty-eight thousand dollars. Previous to the dissolution, July 19, 1884, Kilgour paid off one of the Rea notes, amounting to ten thousand dollars, which was secured by the deed of trust to Wolf and Capin.

Before the trustee's sale an amended petition was filed, making Rea, Capin, and Wolf parties, the prayer being to apply the surplus, if any, after the trustee's sale to the payment of the claims of plaintiff.

The proceeds of the sale were paid in satisfaction of the Rea deed of trust, twenty-seven thousand dollars, and the surplus, less expenses of the sale, was paid to Kilgour, and applied by him in satisfaction of the individual debts owing him by Mitchell. Wolf and Capin took from Kilgour an indemnifying bond before the money was paid him. Of the partnership demands held by plaintiff, some had been reduced to judgments, and some were simple contract debts.

The most important contention on the part of plaintiffs is, that the mortgages made to Kilgour and Mrs. Mitchell by Mitchell, one of the partners, and the quitclaim deed made by Mitchell to Kilgour to secure individual debts of Mitchell, were void as against partnership creditors. They were so held by the circuit court. Other less important questions are involved.

1. It is well settled in this state, as well as in other jurisdictions, that one partner cannot transfer the partnership property for the satisfaction of his individual debt without the consent or acquiescence of the other partners. Each partner has the right, in equity, to have the property of the firm applied to the payment of the partnership debts. Through these equities, among the partners, firm creditors derive the right to have the partnership assets appropriated to the satisfaction of their debts in preference to creditors of the individual partners. The rights of the firm creditors, being derived through the equities of the partners among themselves, can necessarily only exist so long as the partnership itself continues. It necessarily follows that a *bona fide* waiver of their equitable rights by the partners cuts off the derivative equities of the creditors. These principles are announced in the following recent decisions: *Sexton v. Anderson*, 95 Mo. 881, and cases cited; *Huiskamp v. Moline Wagon Co.*, 121 U. S. 810; *Purple v. Farrington*, 119 Ind. 164; *Pepper v. Peck*, R. I., May 17, 1890; 20 Atl. Rep. 16; *Coakley v. Weil*, 47 Md. 277; *Hanover Nat. Bank v. Klein*, 64 Miss. 141; 60 Am. Rep. 47; *Sickman v. Abernathy*, 14 Col. 174; *Carver Gin and Machine Co. v. Bannon*, 85 Tenn. 712; 4 Am. St. Rep. 803; *Woodmansie v. Holcomb*, 84 Kan. 35.

If, by his mortgages to Kilgour and his mother, Mitchell

undertook and intended in good faith to withdraw from the partnership its property for the purpose of appropriating it to the payment of his individual debts to them, and Robertson at the time gave his assent, or afterwards acquiesced thereto, the mortgages would have defeated the rights of the firm creditors to have the property first applied to the payment of their debts. But we do not think such was the intention of the partners, as evidenced by their conduct, nor do we think the mortgages themselves can be given such construction. There can be but little doubt that Robertson acquiesced in the mortgages after he received notice of them, but there is as little doubt that he only understood them to be merely intended to transfer the interest of Mitchell in the property that might remain after paying the debts and settling the accounts of the partnership, and that they were, and would be, subject to the rights of the creditors, prior and subsequent. The mortgage itself only undertook to convey the "right, title, and interest" of Mitchell in the property. As between the partners, each had the "right" to have the whole property appropriated, if necessary, to the payment of the firm debts. The exclusive interest of each partner was only the right to receive a share of what might remain after the partnership liabilities should be settled. It is therefore held, no contrary intent appearing, that the mortgage of partnership property of the character of that held by this firm, made by an individual member to secure an antecedent debt, though with the consent of the other partners, will not overreach the general lien of the partners or the priority of partnership creditors: 1 Bates on Partnership, secs. 186, 291; 1 Jones on Mortgages, sec. 120; *Morse v. Gleason*, 64 N. Y. 204; *Conant v. Frary*, 49 Ind. 530; *Cunningham v. Ward*, 30 W. Va. 572; *Lewis v. Anderson*, 20 Ohio St. 281; *Hiscock v. Phelps*, 49 N. Y. 97; *Priest v. Chouteau*, 85 Mo. 408; 55 Am. Rep. 373.

That it was not the intention that these mortgages should have the effect of overreaching creditors is manifest from the conduct of the parties in withholding the instruments from record for such a length of time, and taking no steps to foreclose, though Kilgour, who held both mortgages, was fully advised that the firm was daily becoming more and more involved.

2. It is insisted that though these mortgages only had the effect of transferring to Kilgour Mitchell's surplus in the partnership property, after payment of the debts of creditors, yet

the quitclaim deed made by Robertson to Mitchell, in July, 1884, conveying to him all the partnership property, had the effect of dissolving the partnership, and of cutting off the derivative equities of the creditors to follow the property into the hands of Kilgour, the vendee of Mitchell.

It is, as a general proposition, true, that after the dissolution of a partnership, even though it may be insolvent, by the sale and transfer of all its property, the creditors cannot follow the property into the hands of the purchaser, but that proposition is subject to the very material, and often controlling, qualification that the transaction must have been in good faith, and not for fraudulent purposes. If these transfers, which undertook to lodge the property in Kilgour, were fraudulent, the rights of creditors were not affected by them, and the property in the hands of Kilgour was not beyond their reach. The question was considered with great care in the case of *Sexton v. Anderson*, 95 Mo. 381, and Black, J., speaking for the court, reaches the following conclusion: "With us each partner is liable for all the partnership debts. The partners may, so long as the firm exists, do with their property as they see fit. The firm creditors have no lien on the partnership property for the payment of their debts while the firm continues to exist. Partners have a right to have the partnership property applied to partnership purposes, but this is a right or lien which they may waive. Hence the great majority of adjudicated cases are to this effect, that all the partners may, by their joint act, dispose of partnership property in liquidation and payment of a debt owing by an individual member of the firm. The qualification is, that the transaction must be in good faith, and not for fraudulent purposes." This conclusion is undoubtedly sound in principle, and is sustained by the highest authority: *Huiskamp v. Moline Wagon Co.*, 121 U. S. 310; *Case v. Beauregard*, 99 U. S. 124; *City of Maquoketa v. Willey*, 35 Iowa, 323; and the authorities cited under the first paragraph of this opinion.

The question then arises as to what effect the conveyance of the partnership property from Robertson to Mitchell, and from him to Kilgour, had upon the rights of the creditors. If the transfers were fraudulent, their rights were not affected thereby; if in good faith, their equities as firm creditors were at an end.

There can be no doubt from the evidence that at the time of the transfer of the property by Robertson to Mitchell, the

firm, and each member thereof, were wholly insolvent. Neither can it be doubted that Kilgour was fully aware of such insolvency. Mitchell, in his purchase from Robertson, having assumed the payment of the partnership debts, the property in his hands should have been applied to that purpose, and diverting it from such purpose to the payment of his private debts to Kilgour raises a very strong suspicion of an intended fraud upon Robertson and the firm creditors.

It must also be concluded, under the evidence, that Kilgour had knowledge of the transaction between Robertson and Mitchell, and all its details. It is evident from all the evidence that Mitchell and Kilgour undertook to so deal with Robertson as to destroy the equities of the firm creditors in the partnership property, and divert it from its legitimate course. The transaction must be held in fraud of the partnership creditors: *Phelps v. McNeely*, 66 Mo. 554; *Bulger v. Rosa*, 119 N. Y. 459; *Stanton v. Westover*, 101 N. Y. 265; *Arnold v. Hagerman*, 45 N. J. Eq. 186; 14 Am. St. Rep. 712; *Darby v. Gilligan*, 83 W. Va. 246; *Caldwell v. Scott*, 54 N. H. 414; *Roop v. Herron*, 15 Neb. 73; *David v. Birchard*, 53 Wis. 492; *Flack v. Charron*, 29 Md. 311. Some of these authorities hold that the transfer of partnership property by one member of an insolvent firm to another, and the transfer by the latter to secure an individual creditor, is fraudulent in law. In this case we hold the transactions to be fraudulent in fact.

3. Upon the death of a trustee of an unexpired trust of personal property, the trust estate descends to his executor or administrator: *Hill on Trustees*, 303; *Hook v. Dwyer*, 47 Mo. 214. A cause of action affecting the trust estate, pending at the death of the trustee in his own name, may be revived and prosecuted in the name of his executor or administrator: 1 *Perry on Trusts*, sec. 343; *Mauldin v. Armistead*, 14 Ala. 702. Colville, being the trustee of an express trust of personal property, was authorized to prosecute the action in his own name (Rev. Stats. 1879, sec. 3463), and upon his death the suit was properly revived in the name of his administrator, it not appearing that a successor had been agreed upon or appointed.

4. The general rule undoubtedly is, that before a creditor can call upon a court of equity to interfere in his behalf in the collection of his debt, he must show that he has a demand certainly ascertained by having been reduced to a judgment at law, and that he has exhausted all his legal remedies: *Mullen v. Hewitt*, 103 Mo. 639; *Crim v. Walker*, 79 Mo. 335;

*Humphreys v. Atlantic Milling Co.*, 98 Mo. 548. This rule, of course, applies to claims which are purely legal, and for the satisfaction of which the creditor has no lien or equitable claim upon specific property. While the creditors of a partnership, strictly speaking, have no lien on the assets of the firm, they have the equitable right to have the assets appropriated to the payment of their debts in preference to the creditors of the individual partners.

As has been seen, the equities of the creditors were not defeated by the conveyance of Robertson to Mitchell, for the reason that when Mitchell took the property, in consideration thereof he assumed the payment of the partnership debts. The rights and equities of the creditors to the appropriation of the specific property can only be determined and enforced by proceedings in equity; but can these rights be declared and enforced in one proceeding in the exercise of original equity jurisdiction? It has been held that under such circumstances as appear in this case, the aid of a court of equity can be invoked to remove obstructions from the title, adjust the equities between the parties, and subject the property accordingly even before a judgment at law has been obtained by the creditor: *Olsen v. Morrison*, 29 Mich. 395; *Case v. Beauregard*, 101 U. S. 688; *Pomeroy on Equity*, sec. 358. The weight of authority, however, holds the contrary, and requires the demands of the creditor to be reduced to judgments at law, creating a lien upon the estate, before a court of equity will take jurisdiction: *Wait on Fraudulent Conveyances*, p. 120, sec. 75; *Young v. Frier*, 9 N. J. Eq. 466; *Dunlevy v. Tallmadge*, 32 N. Y. 457; *Parish v. Lewis*, Freem. Ch. 306; *Reese v. Bradford*, 18 Ala. 847. Without undertaking to reconcile the conflicting authorities, we deem it sufficient in this case to say, that a number of the demands held by plaintiff having been reduced to judgments, the court thereby obtained jurisdiction over the subject-matter; and under the familiar principle that when a court of equity once acquires jurisdiction over the subject-matter it will proceed to do full and complete justice between the parties, we must conclude that the court had jurisdiction to dispose of the whole matter before it: *Real Estate Sav. Inst. v. Collonious*, 63 Mo. 290; *Baile v. St. Joseph etc. Ins. Co.* 73 Mo. 384.

5. One of the firm debts held by plaintiff as trustee had been reduced to judgment against the partners prior to Robertson's conveyance to Mitchell. In order to effectuate the trade between Robertson and Mitchell, and with the under-

standing that the partnership debts were thereafter to be paid by the vendee, Adkins, one of the creditors, paid this judgment and took the individual note of Mitchell for the amount. Defendants now insist that taking the note from Mitchell constituted a release of the partnership. The court allowed the debt as a claim against the partnership. We can see no reason for disturbing the finding of the court in doing so. It does not appear that when Adkins released his judgment and accepted the individual note of Mitchell, he intended to release the partnership from its liability: *Leabo v. Goode*, 67 Mo. 126; *Appleton v. Kennon*, 19 Mo. 637.

6. We do not think the court committed error in permitting the amendment to the petition, making it correspond to the changes which had occurred since the commencement of the suit, nor in allowing new parties who had become interested in the property to be brought in. Amendments are favored, and should be liberally allowed in furtherance of justice: Rev. Stats. 1879, secs. 3568, 3572.

7. It is insisted that by claiming the surplus arising from the trustees' sale, plaintiff admitted its validity, and for this reason the court improperly made the decree in the alternative, so as to require a sale of the property in case the amount of the surplus was not paid in discharge of the claims of plaintiff. We do not think that defendants stand in a position to raise this objection. It appears on Kilgour's own admission, that this sale was made for the purpose of cutting out all claims in this suit. All the parties to the sale were parties to the suit when the sale occurred. The trustees and beneficiary knew the complaint of the creditors. While there is no doubt of the validity of the deed of trust held by Rea, and that he nor his rights were affected by subsequent dealings between the partners and Kilgour, whom they were trying to prefer, yet when he voluntarily comes in, and lends his aid in the efforts of Kilgour and Mitchell to defeat the firm creditors, he will have to bear the taint of their companionship.

The evidence shows that an agreement was perfected prior to the sale, that the amount of the mortgage debts should, as soon as Kilgour bought in the property, be reloaned to him, and a new deed of trust upon the same property taken to secure it. The sale was, therefore, in its effect, only a sham, and made for the preconceived and admitted purpose of defeating an anticipated decree of the court. Under such circumstances, there is nothing inequitable in allowing the plaintiff



all the advantages the sale may give him, without being estopped to deny its validity.

8. Defendant Kilgour insists that he should be given priority over the general firm creditors for the amount of the note for ten thousand dollars, which was secured by the Rea deed of trust, and which he paid off prior to the trustees' sale. This claim is based upon the equitable principle, that in paying this note, he relieved the property from an encumbrance having priority over the rights of partnership creditors, such payment being necessary to protect his own interest in the property, and he thereby became, as between himself and the creditors, entitled to be subrogated to the priority of the encumbrance discharged.

It is a well-recognized principle of equity, that a creditor, who, in order to preserve his own security, is compelled to pay a prior encumbrance held by another creditor, will be subrogated to the rights of such creditor, to the extent necessary for his own protection: 3 Pomeroy's Eq. Jur., sec. 1211; *Aldrich v. Cooper*, 2 Eq. Lead. Cas. 228; Sheldon on Subrogation, sec. 8; *Evans v. Halleck*, 83 Mo. 376; *Allen v. Dermott*, 80 Mo. 56; *Wolff v. Walker*, 56 Mo. 292; *Orrick v. Durham*, 79 Mo. 174.

At the time this note was paid by Kilgour, he held Mitchell's subsequent mortgages on the property, subject to the rights of creditors, to the amount of about thirty-five thousand dollars. This note for ten thousand dollars, secured by a prior deed of trust covering the whole property, was due, and the property was liable at any time to advertisement and sale thereunder. In order to prevent a sale, and in order to secure an extension of time and a reduction of interest on the remaining twenty-five thousand dollars of the debt, he paid this note. In doing so he not only protected his own interest in the property, but also that of the firm creditors. Under the circumstances, we feel no hesitancy in concluding that he was entitled to be reimbursed for the amount so paid, and interest thereon from such payment, in preference to the claims held by plaintiff.

After a careful examination of the evidence, we find no reason for disturbing the finding and decree of the circuit court in any other particular.

Judgment reversed, and cause remanded, with directions to order a credit, as of the date of the trustees' sale, to defendant Kilgour, or the trustees, Wolf and Capin, for ten thousand dollars, the amount of the Rea note paid by Kilgour, with in-

terest thereon from the time of its payment to the date of the trustees' sale, at the rate the remaining unpaid notes bore.

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**PARTNERSHIP — USE OF FIRM MONEY TO PAY INDIVIDUAL DEBT.** — A general partner has no right, without the consent, express or implied, of the other partners, to use the funds or property of firm to cancel his individual debts: *Farwell v. St. Paul Trust Co.*, 45 Minn. 495; 22 Am. St. Rep. 742, and note; extended note to *Davies v. Atkinson*, 7 Am. St. Rep. 377.

**PARTNERSHIP — PRIORITY OF PARTNERSHIP CREDITORS.** — Partnership creditors have a primary and exclusive claim upon the partnership assets of an insolvent partnership: *Hurdley v. Farris*, 103 Mo. 78; 23 Am. St. Rep. 863, and note in which cases are collected; *Kirby v. Schoonmaker*, 3 Barb. Ch. 46; 49 Am. Dec. 160, and extended note.

**PARTNERSHIP — TRANSFER OF ASSETS OF, BY FIRM TO PAY INDIVIDUAL DEBTS.** — The transfer of partnership property by the copartners to pay individual debts is fraudulent and void as to creditors of the firm, unless it was solvent, and had sufficient property to satisfy its debts: *Arnold v. Hagerman*, 45 N. J. Eq. 186; 14 Am. St. Rep. 712, and note; *Hill v. Draper*, 54 Ark. 295. But such a transfer may be made, provided it is done in good faith and without fraud, and is not, as to any of the partners, obnoxious to the statute against voluntary conveyances by insolvent debtors: *Ellison v. Lucas*, 87 Ga. 223.

**TRUSTS. — WHETHER TRUST ESTATE DESCENDS TO PERSONAL REPRESENTATIVE OF TRUSTEE:** See extended note to *Tyler v. Herring*, 19 Am. St. Rep. 290.

**CREDITORS' SUITS — NECESSITY FOR JUDGMENT BEFORE RESORT CAN BE HAD TO EQUITY.** — A return of *nulla bona* on a judgment is sufficient evidence of inability to secure payment to authorize a resort to equity to reach property fraudulently disposed of by a creditor: *Bates v. Cobb*, 29 S. C. 295; 18 Am. St. Rep. 742. If creditors have obtained general judgments against a debtor's estate, but cannot take out execution on account of his death, no further proceedings at law are necessary to entitle them to seek equitable relief against a fraudulent grantee: *Lyons v. Murray*, 95 Mo. 23; 6 Am. St. Rep. 17, and note. A creditor must have prosecuted his claim to judgment as to real property, and to judgment and execution as to personal property, before he can question his debtor's disposition of property in a court of equity: *Post v. Roach*, 26 Fla. 442. The issuance of an execution and its return unsatisfied is a sufficient exhaustion of legal remedies to justify the bringing of a creditor's suit: *Hopkins v. Joyce*, 78 Wis. 443.

**SUBROGATION — DOCTRINE OF, WHEN APPLIED.** — To justify the application of this doctrine, a person must have paid a debt due to a third person, for the payment of which another person was primarily liable, and in doing so he must have acted under compulsion to save himself from loss: *Opp v. Ward*, 126 Ind. 241; 21 Am. St. Rep. 220, and note; *Chaplin v. Sullivan*, 126 Ind. 50; *Brata v. Acter*, 126 Ind. 133.

## STATE v. ARMSTRONG.

[106 MISSOURI, 305.]

**ORIGINAL LAW — VERIFICATION TO INFORMATION UPON KNOWLEDGE AND BELIEF SUFFICIENT.** — The verification to an information charging a criminal libel is sufficient where the facts are stated to be true to the affiant's best knowledge and belief.

**DUPPLICITY IN INFORMATION FOR MISDEMEANOR, TOO LATE AFTER VERDICT TO RAISE OBJECTION OF.** — It is too late after verdict to object to duplicity in an information for a misdemeanor.

**INFORMATION FOR CRIMINAL LIBEL SUFFICIENT WITHOUT CHARGING WILLFUL AND MALICIOUS PUBLICATION, WHEN.** — Where an information for criminal libel charges that the accused did willfully and maliciously libel and defame the prosecuting witness, by sending to her through the mails an envelope with certain libelous indorsements thereon, it is sufficient, although it does not charge that the matter complained of was willfully and maliciously published.

**INFORMATION FOR CRIMINAL LIBEL NOT DEFECTIVE BECAUSE MATTER COMPLAINED OF IS PASTED THEREIN.** — An information for criminal libel for sending through the mail an envelope with libelous matter printed on it is not defective because the libel is set out in it by pasting the original envelope thereon and making it a part thereof, instead of inserting it in writing.

**ENVELOPE SENT THROUGH MAIL WITH WORDS "BAD DEBT COLLECTING AGENCY" ON IT IS LIBEL.** — It is a libel to send through the mail an envelope having printed on it in large letters the words "Bad Debt Collecting Agency."

**AGENCY — PRINCIPAL RESPONSIBLE CRIMINALLY FOR ACTS OF HIS AGENT, WHEN.** — Where it appears that the defendant, in a prosecution for criminal libel for sending an envelope with libelous matter printed thereon through the mail, employed the agency that sent it with knowledge of its methods, and refused to stop its proceedings after having reason to believe it was sending the libelous matter to the prosecuting witness, he will be responsible for the acts of the agency.

**EVIDENCE PASTED INTO INFORMATION, ADMISSIBILITY OF.** — The pasting of a portion of an envelope containing libelous matter into the information does not destroy its character as original evidence or affect its admissibility.

**EVIDENCE THAT PROSECUTING WITNESS OWED DEBTS NOT ADMISSIBLE, WHEN.** — In a prosecution for criminal libel for sending through the mail, addressed to the prosecuting witness, an envelope with the words "Bad Debt Collecting Agency" printed thereon, evidence that the prosecuting witness owed some debts to persons other than the defendant is not admissible for the defense.

**JURY JUDGES OF LAW AND FACT IN PROSECUTION FOR LIBEL.** — In prosecutions for libel, under the constitution of Missouri, the jury are judges of the law as well as of the facts, and are not required to accept the instructions of the court as conclusive; and the court may so instruct them.

THE letter of January 30, 1888, referred to in the opinion, was written by the prosecutrix to the accused, in which she

denied her indebtedness to him, protested against the acts of the agency, and warned him that if he continued in the course he was pursuing it would be at his cost. His reply thereto is as follows: "We differ in opinion on this account. When paid I will stop the agency, and would advise you to pay it at once, and avoid further trouble." Other facts are stated in the opinion.

*George Robertson*, for the appellant.

*John M. Wood*, attorney-general, and *Charles M. Napton*, for the state.

GANTT, P. J. The appellant contends that various errors were committed in this trial, and they will be noticed in the order in which he complains. His first assignment is the insufficiency of the information. The verification is claimed to be bad, because the prosecutrix only swore that the facts stated were "true to her best knowledge and belief." This was ruled otherwise in the recent decision of this court in *State v. Bennett*, 102 Mo. 356. It is next said that the information is bad for duplicity. This objection is raised for the first time in the motion in arrest. There are various methods for taking advantage of duplicity in an indictment or information. A motion to quash, a demurrer, or motion to compel the state to elect, will, either of them, correct this fault; but it is almost universally held that it is too late after verdict to make this objection in a motion in arrest in a misdemeanor: 1 Bishop's Crim. Proc., secs. 442, 448; *Commonwealth v. Tuck*, 20 Pick. 356; Wharton's Crim. Pl., secs. 255, 760. The cause was heard on the charge of libel, the evidence confined to that offense, and the instructions all had reference to that misdemeanor. We cannot see that any substantial right of the defendant was violated in this respect in overruling the motion in arrest. The matter complained of was at most mere surplusage, and this defect, if any, was cured by our statute of jeofails: Sec. 4115, or R. S. 1879, sec. 1821.

Equally groundless is the objection that the information did not charge the matter complained of was "willfully" or "maliciously" published. It distinctly alleges that defendant "did willfully and maliciously libel and defame the prosecuting witness by sending the said envelope with its indorsements through the mails," etc., and is sufficient, according to the most approved precedents. The defendant was

fully informed by it of the nature and character of the offense with which he was charged, and after all, this is the great object of an information or indictment.

It is next urged against this information that it does not contain the written allegations of the libelous matter complained of. Any one reading the information in this cause would be at a loss to understand this objection. As a matter of fact, the point made in argument was not that it was not in writing, but it was not written by the prosecuting attorney at the time the remainder of the information was drawn, but the original envelope, or at least that portion containing the alleged libel, was pasted in the information, and made a part thereof. Learned counsel for defendant seem to think that it was very material who did the writing. This point is entirely too technical to be seriously entertained in a court of justice. Besides these specific objections, there is a general assignment of error that the information does not charge an offense under the statute. This information is drawn under section 3869, Revised Statutes 1889 (R. S. 1879, sec. 1591), which defines a libel as follows: "A libel is the malicious defamation of a person, made public by any printing, writing, sign, picture, representation, or effigy, tending to provoke him to wrath, or expose him to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse; or any malicious defamation, made public as aforesaid, designed to blacken and vilify the memory of one who is dead, and tending to scandalize or provoke his surviving relatives and friends."

Was the sending of this envelope with these indorsements on it the publishing of a libel, tending to expose the prosecutrix to contempt or ridicule, and bring her in disrepute with her employers and the public? We are clearly of the opinion that it was. The words "Bad Debt Collecting Agency" were printed in large, bold type on the envelopes, and were obviously intended to attract the attention of the public. These words must be construed in the light of the times in which they are used. Similar associations had sprung up all over the country, and these devices were resorted to to force debtors to pay their debts. To such extent did they go that the congress of the United States forbade the use of the mails for their distribution. They had become so common that they were thoroughly understood in the mercantile world. Under this state of affairs, the defendant resorts to this Chicago

agency to collect this debt of the prosecutrix. He sets in motion this machine for extorting this money from her. It was known that the prosecutrix was earning her living by her work in the large and responsible dry-goods house of Scruggs, Vandervoort and Barney. Accordingly, these letters, four in number, are directed to her in the care of her employers. All the mail for the employees of this large house was put together and taken by the carriers to the store. There the various clerks went to a common repository for their mail. So that the scheme was well devised to attract the attention of those with whom she was most intimately connected, and without whose respect and good opinion the life of a sensitive woman would soon become a burden and unendurable. This envelope on its face was designed to attract the attention of the public, and when the prosecutrix received these letters in these envelopes the fact was thereby published that this association was in correspondence with her for the purpose of collecting a bad debt; and we cannot shut our eyes to the necessary implication that she was a bad debtor, that she was not in the habit of paying her honest debts, and was unworthy of credit. Nor are we left in doubt that this was the purpose of the association. In the letter which came under cover of this envelope the agency asks her: "Can you afford to have the public know that you refuse to pay this bill? You may need credit again some time, but as long as this account remains in this unsatisfactory manner it will be hard for you to obtain it." In other words: "By means of this style of publishing you to the world we will advertise you as unworthy of credit." Nor was this all. She is warned: "Should you positively refuse to make any arrangements for a liquidation of this claim, we feel justified in advertising the same for sale in the newspapers, as well as to send you a statement regularly until the matter is settled." These regular communications, if sent without these libelous words in large type, would not attract any attention; but received regularly in this form, would give a painful publicity.

The evident purpose and design of the defendant and the association he employed, and for whose acts he is responsible in this matter, was to publish the prosecutrix as a bad debtor, a dishonest person, who would not pay her honest debts, and to degrade her in the eyes of the public and her employers, and as such was clearly libelous, and within the meaning of the statute: *Muetze v. Tuteur*, 77 Wis. 236; 20 Am. St. Rep.

115; *Dennis v. Johnson*, 42 Minn. 301; *Johnson v. Commonwealth*, Penn., May, 1888; 14 Atl. Rep. 425. The law will not countenance or tolerate this method of collecting a debt. The facts that the debt was originally only \$3.45, that it was barred by the statute of limitations, that defendant persisted in his endeavor to extort the money from the prosecutrix after her protest, and the avowed intention of his agents to publish her to the world, and advertise this account for sale in the newspapers, amply sustain the charge that this was maliciously done. To permit a defenseless woman, in this day of enlightenment, to be thus persecuted would be a reproach to our laws: *Beals v. Thompson*, 149 Mass. 405.

It is insisted by defendant that the court ought to have sustained a demurrer to the evidence. The defendant's own letters of February 1 and 14, 1888, both show that he was aware that this agency was sending to Mrs. Vincil letters that she regarded as insulting. She had appealed to him to call off this agency, and he complacently informs her he will when she sends the five dollars. *Qui facit per alium, facit per se*, and this maxim applies in all its strictness in libel. Besides, Bassford, the editor of the Ledger, testified that the defendant told him he was a member of the Sprague Agency, and in referring to Mrs. Vincil's letter, he said he thought she had received a "chromo," to which he alluded. After believing or thinking that she had received this style of a letter from his agents or associates in Chicago, he declined to stop them unless she pays the five dollars. There was ample evidence to sustain the verdict of the jury as to his knowledge and complicity in originating and publishing the libelous envelope. The pasting of the portion of the envelope containing the libelous matter in the information, so as to make it a component part thereof, was unusual, and we think wholly unnecessary; but it certainly did not and could not destroy its character as original evidence in the case; hence the trial court committed no error in admitting it as evidence.

There was no error in admitting the letter of January 30, 1888, in evidence. It was admissible to show defendant's knowledge of the means his agency was pursuing in his behalf, and of the claim that the debt was paid; and his reply, written on the letter itself, shows his determination to persist, notwithstanding the protest of Mrs. Vincil.

Nor did the court err in excluding the evidence of Reed, Emmons, Bedell, and Mrs. Harding, tending to prove that



Mrs. Vincil owed them altogether some \$18.50. No offer was made to prove her general reputation in regard to paying her just debts. She was not expected, nor was the state required, to come prepared to meet and try every individual claim that might be made against her. Evidence of specific indebtedness was not admissible: *Wilson v. Noonan*, 27 Wis. 598; *Campbell v. Campbell*, 54 Wis. 90; *Muetze v. Tuteur*, 77 Wis. 236; 20 Am. St. Rep. 115. Indeed, the fact that after the zealous efforts of defendant to destroy her character as an honest woman he could only find an indebtedness of \$18.50 against her, in a community where she had lived for many years, is rather a vindication. It is questionable, if admitted, if it would have had any appreciable effect upon any sensible juror.

The point made that the court permitted the state's counsel to cross-examine the defendant on matter not elicited by his counsel in chief has been carefully examined, and we have concluded that it really amounts to nothing more than an inquiry if he understood what Mrs. Vincil referred to as insulting in her letter of January 30th. No possible injury could come from this. The court expressly ruled the counsel for the state to a cross-examination of the matter brought out by defendant, and none other was elicited.

The instructions correctly told the jury what was necessary to constitute the libel under the information. The only one requiring special examination is the fifteenth, which informs the jury that they are the judges of the law of libel, as well as of the facts, and they were not required to accept the instructions given by the court as being conclusive of what the law of criminal libel is. Section 14 of article 2 of the constitution of Missouri declares "that no law shall be passed impairing the freedom of speech; that every person shall be free to say, write, or publish whatever he will on any subject, being responsible for all abuse of that liberty; and that in all suits and prosecutions for libel, the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact." It was to this constitutional provision in our bill of rights this instruction referred. In *State v. Hosmer*, 85 Mo. 553, Judge Henry, in discussing an instruction similar to the one complained of here, says: "The defendant asked the court to declare the law to be 'that under the law the jury are to determine the law and the facts in this case.' Section 1594 of the Revised Statutes, 1879, is as fol-

laws: 'In all prosecutions for libel or verbal slander, the truth thereof may be given in evidence to the jury, and shall constitute a complete defense; and the jury, under the direction of the court, shall determine the law and the fact.' I confess that I do not fully comprehend the meaning of the remarkable concluding clause of that section"; and he condemns that instruction. No allusion is made by the learned judge to the bill of rights, nor to the history of this provision in our constitution and law. Section 14 of article 2 of our constitution is but a rescript of section 1 of Fox's libel act, enacted by the British Parliament (32 Geo. III.) in 1792. Before that act it had become to be the rule that the judge, not the jury, should decide whether or not the publication was a libel. The judge would direct the jury to find the defendant guilty on proof of the publication of the innuendoes, and of the other necessary averments. But that act declared and enacted that on the trial of an indictment or information for libel the jury may give a general verdict of guilty or not guilty upon the whole matter put in issue before them. This act in full will be found in Odgers on Libel and Slander, page 665. In the case of *Queen v. Sullivan*, for seditious libel, in 1868, this law was interpreted by Fitzgerald, Judge, who presided in the trial. It is reported in 11 Cox C. C. 51. Among other things, in his charge to the jury, he said: "The next question is of paramount importance, and it is the one of which the jury are the sole judges, whether these publications are seditious libels. That question of law and fact is intrusted to the jury alone. I know that some of you have considerable experience as jurors, and I have often had the duty cast upon me of addressing you as such. You must have observed that in ordinary cases, especially in the crown courts, the questions were divided into those of law and fact. The questions of law are usually for the judge, and on them the jury are bound to take his direction. The questions of fact are solely for their determination. In this peculiar case of libel the law of the land says the jury shall determine the whole question whether the publication is a libel or a seditious libel. That power has been given to the jury for the purpose of protecting the inviolable blessing of a free and independent press. You should bear in mind that, while you will receive assistance from me, you are not bound to follow anything I tell you. You are the sole judges of law and fact."

In *Rex v. Burdett*, 4 Barn. & Ald. 181, Mr. Justice Best

said: "Libel is a question of law, and the judge is the judge of the law in libel as in all other cases; the jury having the power of acting agreeably to his statement of the law or not." When we remember the origin of this provision in our constitution, that it was the result of the speech made by Lord Erskine, in his defense of the Dean of Asaph in 1784, a speech declared by Fox to be the finest argument in the English language, and that this speech prepared the way for the adoption of Fox's libel bill in 1792, it is impossible for us to view it as having no other or different meaning than the other provisions guaranteeing a jury trial. Does not the usual construction apply here as in other cases, that, when foreign laws are adopted, and made a part of our code, the presumption is, that we adopt also the construction already given by the foreign courts where they had their origin? As we have seen, the English courts make a broad distinction in prosecutions for criminal libel and all other cases as to the province of court and jury. The scope of this opinion forbids any further elaboration of the great principles upon which this provision is founded. The argument of Lord Erskine on the right of juries in criminal libel is in itself a complete history, and will be found reported in full in 21 How. St. Tr. 847-1046. Viewed in the light of the history of the constitutional provision, and the great contest for the freedom of the press out of which it grew, and of the construction given Fox's libel bill by the English judges, did the criminal court err, after it had fully instructed the jury in this cause, in further instructing them that they were themselves the judges of the law of libel, as well as of the facts, and that they were not required to accept the instructions given by the court as conclusive of the law of criminal libel? Is not this instruction, in substance and effect, just what the constitution commands? and is it not simply another way of stating the same principles that were announced by Judge Fitzgerald in the Sullivan case, *supra*, and Justice Best in *Re v. Burdett*, 4 Barn. & Ald. 131, viz., that, while the judge may assist and inform them what the law is,—and it is his duty to do so,—still they are, by virtue of organic law, the final judges in a prosecution for criminal libel? We think so; and in so doing we conclude that the decision in *State v. Hosmer*, 85 Mo. 558, was decided without this constitutional provision, and its history having been brought to the attention of this court, and inasmuch as it is of the very gravest importance that the constitu-

tion itself should govern, we think *State v. Horner*, 85 Mo. 553, should not longer be followed.

This brings us to the conclusion that there are no reversible errors in the record in this cause, and the judgment of the criminal court is accordingly affirmed.

**LIBEL — CRIMINAL — NECESSITY FOR ALLEGING MALICIOUS PUBLICATION.** — Malicious intent is to be inferred as a conclusion of law from the publication of a libel, without evidence of the truth of the libel or its publication for some warranted purpose: *Commonwealth v. Blanding*, 3 Pick. 304; 15 Am. Dec. 214.

**LIBEL — SENDING ENVELOPE THROUGH MAIL WITH MATTER PRINTED THEREON.** — Sending a letter through the mail in an envelope on which were printed the name of an association and the statement that it was an organization for the collection of bad debts is a publication of a libel: *Mueser v. Tutwiler*, 77 Wis. 236; 20 Am. St. Rep. 115, and note.

**AGENCY — PRINCIPAL WHEN LIABLE FOR CRIMINAL ACTS OF AGENT.** — A principal is criminally liable for the acts of his agent when he has participated in the acts, or has given such assent or concurrence thereto as would involve him morally in the guilt of the act: *Commonwealth v. Nichols*, 10 Met. 269; 43 Am. Dec. 432, and note; see extended note to *Henry v. Heeb*, 5 Am. St. Rep. 618, on ratification of criminal acts of agent by principal.

**LIBEL — PROVINCE OF JURY.** — The constitution of South Carolina provides "that in all indictments for libel the jury shall be the judges of the law and the facts." Notwithstanding this provision, the judge is to charge it on the law of libel, and any error therein may be reviewed on appeal: *State v. Sypirett*, 27 S. C. 29; 13 Am. St. Rep. 613, and extended note.

## OLYBURN v. McLAUGHLIN.

[MO. MISSOURI, 321.]

**EJECTMENT, EQUITABLE DEFENSE MAY BE SET UP BY ANSWER IN.** — A defendant in an action of ejectment may, under the Missouri code, interpose by answer an equitable defense, and his equities may be tried and determined directly in that action, without having to resort to an independent suit in equity.

**APPEAL, ONLY QUESTION TO BE DETERMINED ON, WHERE EQUITABLE DEFENSE SET UP IN EJECTMENT.** — In an action of ejectment, where equitable defenses are interposed, and a trial is had by the court without a jury, if no exceptions to the evidence or to the special finding of the court are saved, and no declarations of law are asked, given, or refused, the only question for the supreme court to review upon appeal is, whether the evidence justified the finding and judgment.

**TAX SALE OF LAND, OWNER RATIFIES BY ACCEPTING PART OF PROCEEDS OF, WHEN.** — Where an owner of land sold for taxes, with knowledge of all the facts, accepts a part of the proceeds of the sale, he thereby recognizes and ratifies its validity, and cannot afterwards be heard to question it.

*T. J. Myers, for the appellants.*

*Irvin Gordon, for the respondents.*

**MACFARLANE, J.** This is a suit in the usual form of ejectment to recover possession of two forty-acre tracts of land in Vernon County. The answer was a general denial, estoppel, and laches in commencing this suit.

In the plea of estoppel it is alleged, in substance, that the land in controversy was sold in May, 1880, upon execution, under a judgment of the circuit court of Vernon County against plaintiffs for delinquent taxes, and purchased by S. A. Wight, and that defendants are in possession, and claim title under mesne conveyances from him; that under the sheriff's sale there was a surplus of \$76.81 after payment of taxes, interest, and costs, which plaintiffs, being advised of all the facts, demanded and received from the sheriff, thus ratifying and confirming the sale; and that defendants, in purchasing the lands from their grantors, relied upon the fact that plaintiff had thus ratified the sale. Defendants also alleged, in substance, that plaintiff, with knowledge of all the facts, stood by for years and saw defendants and their grantors enter into possession of the land under said deed, and make valuable and lasting improvements thereon, without objection. The reply was a general denial.

On the trial defendants read in evidence the sheriff's deed, and plaintiff's read the order of publication. Defendants then offered evidence tending to prove the special defenses. Some objections were made by plaintiffs to the validity of the judgment sale and deed. The court found for defendants, and judgment was rendered against plaintiffs for costs, and they appeal.

1. The question for first consideration is, whether the plea of estoppel, if sustained by the proof, constituted a good defense to the action of ejectment. It is well settled in this state, that under our Code of Civil Procedure a defendant, in an action of ejectment, may, by answer, interpose an equitable defense, and that his equities may be tried and determined directly in that action, without having to resort to an independent suit in equity: *City of St. Louis v. Schulenburg Lumber Co.*, 98 Mo. 613; *Schuster v. Schuster*, 93 Mo. 488; *Allen v. Logan*, 96 Mo. 591.

2. The issues were tried by the court without a jury, the finding was for the defendants, and judgment was rendered

accordingly. There having been no exceptions to evidence, or special finding by the court, and no declarations of law having been asked, given, or refused, the ground upon which the finding and judgment of the circuit court rests, and the view taken by that court of the facts before it, cannot be determined. There is consequently nothing in the record for this court to review, except to determine whether the evidence justified the finding and judgment: *Cunningham v. Snow*, 82 Mo. 593, and cases cited.

8. The next inquiry is, Did defendants set up such an equitable defense in this case as would defeat recovery? It is a well-recognized principle of the law of estoppel that "no person will be allowed to adopt that part of a transaction which is favorable to him, and reject the rest, to the injury of those from whom he derived the benefit": *Austin v. Loring*, 63 Mo. 22. It is further said by Wagner, J., in the same case: "When a sale of land is made, no person can be permitted to receive both the money and the land. And it has been held, in the application of this principle, that it makes no difference whether the proceedings under which the sale occurs are voidable, or wholly void in consequence of the want of jurisdiction. In 21 Smith's Lead. Cas., 5th Am. ed., 662, the author says that when those who are entitled to avoid a sale adopt and ratify it, by receiving the whole or any part of the purchase-money, equity will preclude them from setting it aside subsequently, for reasons that are too plain for statement": Herman on Estoppel, sec. 1069, p. 1199; *Nanson v. Jacob*, 93 Mo. 346; 3 Am. St. Rep. 581; *Chase v. Williams*, 74 Mo. 429. The principle which these cases illustrate, and which is founded upon common honesty and good faith, is invoked in this defense.

While the delinquent taxes were a lien and charge on this land, it was also an obligation resting upon plaintiffs, personally, which good citizenship required them to discharge. This they neglected to do. The land was sold to satisfy this charge, and the purchaser paid the price, and thus relieved plaintiffs of their personal obligation. Afterwards, as the evidence showed, one of the plaintiffs, acting for and in the interest of both, investigated the sale, discussed and considered the propriety of compromises, and finally, with full knowledge of all the facts, accepted a part of the proceeds of the sale, thus recognizing and ratifying its validity. To permit these plaintiffs to affirm the sale, and hold the proceeds in one hand, and to

reject the sale, and take the land with the other, would be an encouragement of bad faith which courts of equity will not allow.

Being of the opinion that the acceptance of the balance of of the purchase price from the sheriff constituted a ratification and affirmance of the sale, it becomes unnecessary to consider questions discussed regarding the validity of the sale and deed, nor the effect of the conduct of plaintiffs in standing by in silence for years, while the purchasers were improving the land. Judgment affirmed. —

**EJECTMENT — EQUITABLE DEFENSES IN.** — In ejectment under the code a defendant may avail himself of any equitable defense: *Prentiss v. Brewer*, 17 Wis. 635; 86 Am. Dec. 780, and note. The same rule exists under the New York code of 1848: *Orary v. Goodman*, 12 N. Y. 506; 64 Am. Dec. 506, and note. In Texas an equitable title may be set up as a defense to an action of ejectment: *Neill v. Keese*, 5 Tex. 28; 51 Am. Dec. 746; *Nichols v. Shearon*, 49 Ark. 75. Equitable title cannot be shown in defense in ejectment: *Kirkpatrick v. Clark*, 182 Ill. 842; 22 Am. St. Rep. 531, and note, with cases maintaining that doctrine collected.

## STATE v. ECKLER.

[106 MISSOURI, 386.]

**SEDUCTION UNDER PROMISE OF MARRIAGE — INDICTMENT FOR, WHEN SUFFICIENT.** — An indictment for seduction under a promise of marriage, which alleges that the defendant seduced the prosecutrix under promise of marriage, is sufficient without alleging that she promised to marry him.

**SEDUCTION — EVIDENCE ADMISSIBLE ON TRIAL FOR.** — Upon the trial of an indictment for seduction under a promise of marriage, the defendant may ask the prosecutrix if she had ever authorized any one to accept money to settle the suit.

**SEDUCTION — IN PROSECUTION FOR, STATE MUST PROVE GOOD REPUTE OF PROSECUTRIX.** — In a prosecution for seduction under a promise of marriage, the state is required to allege and prove in the first instance the good repute of the prosecutrix.

*George Robertson*, for the appellant.

*John M. Wood*, attorney-general, for the state.

**THOMAS, J.** Defendant was found guilty of seduction under promise of marriage, in the circuit court of Montgomery County, in October, 1889, and sentenced to two years' imprisonment in the penitentiary.



1. The court committed no error in overruling defendant's motion to quash the indictment. It charged that defendant seduced Ida Mitchell "under promise of marriage." This was sufficient, without averring that Ida Mitchell promised also to marry him: *State v. Primm*, 98 Mo. 868.

2. At the close of the evidence the defendant asked the court to instruct the jury to return a verdict of acquittal, which the court refused to do, and this is assigned for error. Ida Mitchell, the prosecutrix, testified that defendant promised to marry her, and that she had intercourse with him solely because he made the promise, upon which she relied. The argument is, that this testimony of hers shows a bargain and sale of her virtue, and for that reason the court ought to have declared, as a matter of law, that defendant committed no crime under the circumstances detailed by the girl; and *State v. Reeves*, 97 Mo. 668, 10 Am. St. Rep. 349, is cited as authority for that position. In the first place, the report shows that the majority of the court did not indorse all that was said in that case. Two of the judges are marked as concurring in the result only, while one dissented *in toto*, so that the opinion as an entirety had the concurrence of two judges only. In the second place, we do not regard that case as teaching the doctrine contended for. It is true, Judge Sherwood, who delivered the opinion, did use very strong language in condemnation of a girl who would bargain her virtue in consideration of a promise of marriage; but he was discussing an instruction which omitted the word "seduce," and the instruction was condemned solely because of such omission.

We do not understand that the learned judge intended to lay down the doctrine that if a virtuous girl should be seduced by reason of a promise of marriage no crime would be committed. His language, though vigorous, taken with its context, will not bear the construction defendant's counsel gives it. Nor will the statute bear such construction. The language is, that "if any person shall, under or by a promise of marriage, seduce and debauch any unmarried female of good repute," etc. What is the plain, ordinary meaning of the words "under or by a promise of marriage"? They evidently mean, by means, by virtue, by reason of a promise of marriage. That is, the man makes the promise, and then by using it as a means he seduces and debauches the girl. How can he use it as a means, unless he brings it to bear on her volition, by impressing his victim with the conviction that he

honestly intends to consummate the marriage? Suppose the testimony of the girl in this case was reversed, and that she had sworn that she did not yield to the lustful embraces of defendant relying in confidence upon the promise he made her, but that she would have submitted herself to him anyhow, whether the promise of marriage had been made or not, will any one contend for a moment that defendant would have been guilty of a crime? In that case it could not be held that he seduced and debauched her "under or by a promise of marriage."

To constitute the crime denounced by the statute under review, the female must rely on the promise of marriage, and submit her person to the other party because the promise was made. The promise must be the inducement for her consent to the intercourse. And this construction of the statute has the consent of reason, and justice too, to support it. Granting that both parties stand equal in the momentary gratification of their sexual passions and desires, and are equally anxious to indulge "in the pleasures of sin for a season," behold how unequal they stand as to the results! The man takes but slight risks of losing reputation in society; the woman assumes the risks of becoming a social outcast, and of being spurned from society. He takes no risks of physical or mental pain; she assumes the risks of the pains of pregnancy and maternity. He takes no risks of being marked for the scorn and contempt of his associates; she takes the risks of carrying with her, before and after she becomes a mother, the evidences of her shame. He takes no risks of being encumbered with the fruits of their illicit commerce; she takes the risks of bringing into the world a bastard, which will, besides making her a social outcast, increase her burdens of life, and at the same time operate to diminish her opportunities to gain a livelihood, and to make another eligible matrimonial alliance. He goes forth free from pain, from shame, from loss of caste in society, from encumbrance in all respects; she, in case of pregnancy, is abandoned and left a ruined and fallen woman, deeply impressed with a sense of shame, and spurned by society. We cannot conceive of a more pitiable object than a girl who, deceived by the promise of marriage to the man she loves, yields her person to his embraces, and then be abandoned to her fate by her seducer, to bear all the burdens of her forlorn situation alone.

These are the burdens the woman must bear by reason of

her sin, fully participated in by the man. If the defendant, with intent to cheat and defraud, had obtained from Ida Mitchell thirty dollars in money or property by deception and false pretense, he would have been guilty of a felony. And the statute has wisely provided that if he rob her of the dearest jewel she possesses, by a false promise of marriage, he shall also be guilty of a felony. It is no answer to say she voluntarily consented; so did he. She offered to marry him in good faith; he promised to marry her in bad faith. She consented to the illicit intercourse confidently relying on the defendant's promise to make her his wife, and thus legitimize the possible fruits of such intercourse. He plays a false part. He makes her believe he intends to marry her when he does not. He makes the promise, not for the purpose of consummating the marriage, but for the purpose of obtaining her consent to gratify his lusts. Shall it be said that a man who is thus false, and by deception and fraud induces a girl to do that which bears such bitter fruit for her, and then heartlessly deserts and abandons her, shall be adjudged guilty of no crime? We answer most emphatically, No!

While on this point, we will take occasion so say, as the case will be sent back for new trial for error hereafter to be noticed, that the court's instructions were too favorable to defendant. In the first place, the court told the jury that "by the term 'seduced,' as used in the indictment, is meant that a virtuous woman has been corrupted, deceived, and drawn aside from the path of virtue which she was pursuing, by such acts and wiles as calculated to operate upon a virtuous female. The term 'debauch' means carnally known." If the words "in connection with a promise of marriage" had been inserted in this instruction after the word "wiles," it would have been faultless. But the court, by modifying an instruction prayed for by defendant, went farther, and told the jury that "if defendant promised the said Ida Mitchell to marry her, or that he would marry her by a certain time if she would permit him to have sexual intercourse with her, and she, on the faith of such promise alone, without being seduced as before defined, did consent, and did have such intercourse with defendant," they would acquit him. This is not the law.

Mr. Bishop, in his work on statutory crimes, section 688, says: "If the marriage promise was the inducement to the girl to yield to him, rendering it void because founded on an immoral consideration, it is still sufficient as foundation for

this indictment." Mr. Desty uses this emphatic language in his American Criminal Law, section 135 a: "The promise of marriage must be the consideration, and it must be a promise in the nature of a deceit." In *Kenyon v. People*, 26 N. Y. 203, 84 Am. Dec. 177, the trial court charged the jury that "if you shall be fully satisfied from the evidence that the defendant promised to marry the prosecutrix if she would have carnal connection with him, and she, believing in such promise, and intending on her part to accept such offer of marriage, did have such carnal connection, it is a sufficient promise of marriage under the statute." In speaking of this charge, the court of appeals says: "This seems to me unobjectionable. It is not necessary that the promise should be a valid and binding one between the parties. . . . It is enough that a promise is made which is a consideration for or inducement to the intercourse." In *Boyes v. People*, 55 N. Y. 644, the prosecutrix testified that the promise of marriage was a conditional one, that the accused would marry her if she would consent to an illicit connection with him, and that, relying on the promise, she consented. Held, that this was sufficient to bring the case within the statute; citing *Kenyon v. People*, 26 N. Y. 203; 84 Am. Dec. 177.

The supreme court of Indiana, in *Callahan v. State*, 68 Ind. 198, 30 Am. Rep. 211, held that "a promise of marriage by means of which a seduction is accomplished, made by the defendant to the prosecutrix on condition that she will consent to the act of sexual intercourse, is a promise of marriage within the meaning of section 15, 2 Revised Statutes, 1876, page 431, defining the crime of seduction." The cases from New York and Indiana are in point in this case, for the statutes of those states as to the promise of marriage are identical with ours.

These citations are enough to show what the general doctrine is, and they fully sustain the views we have expressed herein. The question whether the prosecutrix yielded her person, relying on defendant's promise made at the time, as the inducement to the intercourse, is one of fact, and not of law. The fact that the offer to marry was made in consideration that she would consent to carnal connection may be considered very properly by the jury in determining the influences that operated upon the woman at the time. The promise must not only be made, but she must act upon it in good faith, and be deceived by it; and whether she accepted the promise in good faith, and was deceived by it, is a question for the jury.

In the case at bar, the trial court informed the jury that if defendant seduced and debauched Ida Mitchell under promise of marriage he was guilty. This, with the definition of the words "seduce" and "debauch," as above noted, and with an instruction that the girl must be corroborated as to the promise of marriage, properly defined the offense. The use of the words "seduce" and "debauch," as they were defined, obviated the very objections made to the instruction in *State v. Reeves*, 97 Mo. 668, 10 Am. St. Rep. 849; and the giving of the modified instruction at the instance of defendant, above noted, interjected an improper and erroneous element into the case, and should have been refused.

We do not wish to be understood as non-concurring in all that has been said by this court in regard to the meaning of the word "seduce." We think the interpretation given it is correct. A woman finding herself pregnant has the most potent motives to assert that her condition was brought about by a promise of marriage. These are obvious. She must excuse the act to her family, friends, and society, and we can readily see how every consideration would impel her to attribute it to deception and betrayal. Hence, her testimony ought always to be closely scrutinized.

3. The defendant asked the prosecutrix, while on the witness-stand, on cross-examination, if she had ever authorized any person to accept money to settle the case, or offered to take money and dismiss it; and on objection of the state, she was not required or permitted to answer. The evidence shows that the prosecuting attorney wrote defendant that Miss Mitchell told him to settle the matter in any way he saw fit. We think the court committed error in refusing to require the prosecutrix to answer the question propounded. The evidence of the marriage, outside of the girl's testimony, was very meagre indeed. This promise was most positively denied by defendant. The girl was over twenty years of age at the time of the alleged seduction, and the defendant had a right to know what motives and influences operated upon her mind in the prosecution of the case, in order to know what weight to give her testimony: Wharton on Evidence, secs. 547, 566; *State v. Downs*, 91 Mo. 19. This is a close case, and the exclusion of such evidence probably operated to defendant's prejudice: *State v. Thomas*, 78 Mo. 328.

4. The state is required in a case of this character to allege

and prove, in the first instance, the good repute of the female: *State v. McCaskey*, 104 Mo. 644.

The judgment is reversed for the errors hereinbefore pointed out, and the case remanded for new trial.

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**SEDUCTION UNDER PROMISE OF MARRIAGE, WHAT IS.** — Seduction by means of a promise to marry is committed if the man has carnal intercourse to which the woman's assent was obtained by means of such promise: *Putnam v. State*, 29 Tex. App. 454; 25 Am. St. Rep. 733, and note.

**SEDUCTION — NECESSITY TO PROVE GOOD CHARACTER OF PROSECUTRIX.** — Upon a trial for seduction, the usual presumption of chastity in a woman does not exist: *State v. Wenz*, 41 Minn. 196. See note to *People v. De Fore*, 8 Am. St. Rep. 871; note to *State v. Carron*, 87 Am. Dec. 407. The chastity of the prosecutrix in an action for seduction is to be presumed in the absence of evidence to the contrary: *Munkers v. State*, 87 Ala. 95.

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## EX PARTE BUSKETT.

[106 MISSOURI, 602.]

**CONSTITUTIONAL LAW. — WITNESS NOT EXCUSED FROM DISCLOSING NAMES OF OTHERS WHO HAVE BEEN GAMBLING, WHEN.** — The provision of a state constitution, that "no person shall be compelled to testify against himself in a criminal case," will not excuse a witness before a grand jury from disclosing the names of persons other than himself who have been gambling in the county within a year last past, where a statute of such state provides that such testimony given by one who has himself been gambling "shall in no case be used against him." The protection of such statute is co-extensive with that intended to be afforded by the constitution.

*J. B. Harrison and T. J. Jones*, for the petitioner.

**MACFARLANE, J.** This is an application by petition of J. L. Buskett for release on writ of *habeas corpus* from the custody of John W. Cooper, sheriff of Phelps County, and from the common jail of said county, in which he is confined.

The petition and attached record show that petitioner was summoned before the grand jury of Phelps County as a witness, and was asked if he knew the names of any parties or person who had been gambling with cards or otherwise in Phelps County within the last year. To this questioned he answered Yes. Petitioner was then asked who they were other than himself. This question the witness refused to answer, giving as a reason for such refusal that the answer would criminate himself, and "would lead to the divulging of evidence that would convict" him of the misdemeanor. The fact of the

refusal to answer was duly communicated to the court. The court decided that the question was proper, and that petitioner should answer, informing him at the same time that his testimony should in no case be used against him. Still refusing to answer, he was adjudged guilty of a contempt, and a fine of twenty-five dollars imposed upon him. In default of payment of the fine, he was ordered committed to the county jail until the fine should be paid. From this confinement he asks to be discharged.

Petitioner insists that he was privileged to refuse to answer the question on the ground of the protection guaranteed him by section 23 of the bill of rights, which provides that "no person shall be compelled to testify against himself in a criminal cause." On the other hand, the state contends that ample protection was afforded petitioner under section 3819, which is as follows: "No person shall be incapacitated or excused from testifying touching any offense committed by another, against any of the provisions relating to gaming, by reason of his having betted or played at any of the prohibited games or gaming devices, but the testimony which may be given by such person shall in no case be used against him."

Petitioner insists that this statute infringes his rights under the said section of the constitution, and is therefore void. Waiving the inquiry in this case whether the validity of the judgment imposing the fine on petitioner could be inquired into or impeached in this collateral proceeding, and whether an appeal or writ of error would lie from the judgment, we will consider the real question in the case.

Petitioner claims that section 23 of the bill of rights, providing that "no person shall be compelled to testify against himself in a criminal cause," gives him the absolute right to refuse answering any question or giving any testimony which would either tend directly to prove him guilty of a crime, or would afford information, or point out sources of information, which might lead to fastening a crime upon himself; that section 3819 falls short of giving him that full and complete indemnity against prosecutions for crimes, about which he may be called to testify, and which may be indirectly disclosed by the evidence given, and that said section is, for that reason, in conflict with section 23 of the bill of rights, and is without force or validity.

The common-law maxim which is thus incorporated in the constitution of the state has ever been estimated and held as



one of the most sacred personal rights guaranteed the citizens of this country and of England. It finds a place in every state constitution, as well as in that of the United States, and should, therefore, receive such liberal construction as will secure to the citizen its full protection against inquisitorial oppression. The right thus secured would be but an empty mockery if its privileges could be impaired under a pretense of legislative regulation.

It becomes proper, then, briefly to inquire into the extent of the privilege thus accorded, in the absence of any statutory protection, and see what, if any, rights are infringed. In *People v. Kelly*, 24 N. Y. 74, Denio, J., in considering a like provision of the constitution of New York, says: "The history of England in early periods furnishes abundant instances of unjustifiable and cruel methods of extorting confessions, and the practice at this day in the criminal tribunals of the most polished countries in continental Europe is to subject an accused person to a course of interrogatories which would be quite revolting to a mind accustomed only to the more humane system of English and American criminal law. It was not, therefore, unreasonable to guard, by constitutional sanctions, against repetition of such practices in this state; and it is not at all improbable that the true intention of the provisions in question corresponds with the natural construction of the language. But there is great force in the argument that constitutional provisions, devised against governmental oppressions, and especially against such as may be exercised under pretense of judicial power, ought to be construed with the utmost liberality, and to be extended so as to accomplish the full object which the author apparently had in view, so far as it can be done consistently with any fair interpretation of the language employed. The mandate that an accused person should not be compelled to give evidence against himself would fail to secure the whole object intended, if a prosecutor might call an accomplice or confederate in a criminal offense, and afterwards use the evidence he might give to procure a conviction on the trial of an indictment against him."

The question came before this court in a very early day in *Ward v. State*, 2 Mo. 120, 22 Am. Dec. 449, in which McGirk, C. J., wrote the opinion of the court. The facts in the case were similar to those shown by this record. A witness before the grand jury was asked: "Do you know of any person or persons having bet at a faro-table in this county within the

last twelve months?" To which the witness answered, "I do." The witness was then asked to tell what person or persons have so bet other than himself. The witness declined answering this question, saying he could not answer it without implicating himself. The question before the court was, whether the witness could be required to answer. The court adopted the rule laid down by Chief Justice Marshall in *Burr's Trial*, 245: "That it is the province of the court to judge whether any direct answer to the question that may be proposed will furnish evidence against the witness. If such answer may disclose a fact which forms a necessary and essential link in the chain of testimony, which would be sufficient to convict him of any crime, he is not bound to answer it so as to furnish matter for that conviction. In such case, the witness must himself judge what his answer will be, and if he say on his oath he cannot answer without accusing himself, he cannot be compelled to answer."

It is said by the supreme court of Virginia (*Kendrick v. Commonwealth*, 78 Va. 498), in speaking of a similar provision of the constitution of that state: "It ought to be construed with the utmost liberality consistent with the due execution of the laws and the safety of society. But while it is a settled maxim of law that no man is bound to criminate himself, it is also a rule of law, and a necessity of public justice, that every person is compellable to bear testimony in the administration of the laws by the duly constituted courts of the country." This court in *State v. Talbott*, 73 Mo. 857, cites approvingly the rules given by Greenleaf in his work on evidence (vol. 1, sec. 451): "Where the answer will have a tendency to expose the witness to a penal liability, or to any kind of punishment, or to a criminal charge, the witness is not bound to answer."

It will be seen by these decisions that the protection given the witness under the constitution has not been construed literally, and confined to an exemption from testifying in a criminal proceeding in which he himself is prosecuted, but has been extended to protect him in all cases in which his evidence would prove "a necessary and essential link in a chain of testimony which would be sufficient to convict him of crime."

The question then arises, Does the statute afford the witness protection and immunity equal to that afforded him under the constitution? If it does so, then section 8819 does not deprive petitioner of any constitutional right or privilege, and is valid. There can be no doubt that the language of the statute

granting protection, that "the testimony which may be given by such person shall in no case be used against him," is as broad as the constitutional privilege, "that no person shall be compelled to testify against himself in a criminal cause." It might, therefore, be sufficient to hold, as was done by Brown, J., in *United States v. McCarthy*, 18 Fed. Rep. 89: "The reason of the former rule exempting witnesses from giving compulsory testimony against themselves was, that their testimony might be used to convict them. The statute above quoted, in preventing all possible use of testimony thus given, does away with the reason of the rule; and there is, therefore, no longer any ground for its application." But in this case, what fact could have been disclosed by petitioner in his testimony which could have been used as a link in a chain of evidence upon which he might have been convicted of a criminal offense, against the use of which, in a trial against himself, he was not given as full protection as the constitution afforded him? He was fully protected against the use of any admissions or declarations he may have made against himself. Suppose he had answered that he had seen A and B gambling with cards. What fact would have been disclosed that could have "formed a link in a chain of evidence" against himself? To look on at others gaming is not a criminal offense subjecting the observer to prosecution.

It is insisted, however, and this is the main ground of contention, that facts might be disclosed which would afford facilities for fastening the guilt upon the witness. Thus it is contended, if witness should have answered that he had seen A and B gaming, then they could be called as witnesses to prove that petitioner was at the same time engaged in gaming. It will be seen that this illustration assumes a case outside the protection of the constitution itself as most liberally interpreted. The court in the case of *People v. Kelly*, 24 N. Y. 74, speaking on this possibility, says: "But neither the law nor the constitution is so sedulous to screen the guilty as the argument supposes. If a man cannot give evidence upon the trial of another person without disclosing circumstances which will make his own guilt apparent, or at least capable of proof, though his account of the transactions should never be used as evidence, it is the misfortune of his condition, and not any want of humanity in the law."

Referring again to the opinion of McGirk, C. J., in case of *Ward v. State*, 2 Mo. 120, 22 Am. Dec. 449, his concluding ob-

servations meet directly the point here urged: "But in this case it is said, if the witness is bound to tell who bet at the game, without naming himself, then those persons who are named will be examined as to the fact whether he bet; and if the witness is not compelled to name who did bet, then they will remain unknown to the grand jury, and cannot be examined whether the witness bet. I understand this doctrine to be grounded more on the fear of retaliation than on any sound principle of law. Will the law permit a man to keep offenses and offenders a secret, lest the offenders should in their turn give evidence against him?" We think the protection of the statute co-extensive with that intended to be afforded by the constitution. We are supported in this conclusion by the following cases and others, cited in 82 Cent. Law Jour. 868, construing like statutes: *State v. Quarles*, 18 Ark. 307; *Kneeland v. State*, 62 Ga. 397; *Wilkins v. Malone*, 14 Ind. 153; *In re Counselman*, 44 Fed. Rep. 268.

Ordered that petitioner be remanded to custody.

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**WITNESSES — WHEN PERSONAL PRIVILEGE DOES NOT EXTEND.** — Where two persons are engaged in the common criminal enterprise of uttering and publishing counterfeit bills, one of them may be questioned touching the part taken by the other in the passing or redemption of the bills: *May v. State*, 14 Ohio St. 461; 45 Am. Dec. 548. A horse-race is a game within the meaning of the Indiana statute compelling parties concerned in the transaction to testify against one indicted for gaming: *Chaceum v. State*, 8 Blackf. 332; 44 Am. Dec. 771.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**NEBRASKA.**

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**HARTFORD FIRE INSURANCE COMPANY v. MEYER.**

[30 NEBRASKA, 126.]

**JUDGMENTS — SUIT TO ENJOIN. —** In an action to enjoin a judgment upon the ground that it was rendered through a breach of duty by an attorney, and that the plaintiff has a full and complete defense, the facts constituting such defense must be pleaded, and must be sufficient to show that the judgment is unjust.

**JUDGMENTS — INJUNCTION AGAINST. —** A judgment will not be enjoined unless it appears to be inequitable as between the parties, no matter how irregular were the proceedings under which it was rendered.

*J. R. Webster, B. P. Helmer, and B. P. Venetta, for the appellant.*

*J. B. Strode and Byron Clark, for the appellees.*

**MAXWELL, J.** This is an action to enjoin a judgment rendered in the district court of Cass County. It appears from the record that in 1883 one William R. Carter was engaged in the mercantile business in Cass, and had his stock insured in the Hartford company for the sum of \$650; that during the spring of that year, and while said policy was in full force, the goods were greatly injured or destroyed by fire; that the firm of Cook, Phillips, and Wells had a chattel mortgage on said stock for the sum of \$228, and after the loss they filed a petition in equity enjoining the plaintiff from adjusting the loss and paying the same to Carter or the defendants, and praying in effect that a sufficient amount of the insurance be assigned to them to satisfy their claim. The defendants employed a firm of attorneys to defend their rights in the premises, and the plaintiff employed the senior member of said firm to protect its

rights. The attorneys named procured a dissolution of the temporary injunction, and on the trial of the main issue amended the defendants' answer, which was in the nature of a cross-bill, by adding "and thereupon, as by said policy of insurance required, within the time file fully verified proofs of his loss, amounting to about \$650, with their agent, D. H. Wheeler, and that he complied in all respects with the conditions of said policy of insurance," and also amended the prayer, and in the answer to the petition for the injunction took judgment against the plaintiff and in favor of the defendant, as assignee of the policy, for the sum of \$300. This is the judgment which is now sought to be enjoined. The ground upon which this relief is sought, as set forth in the petition, are as follows: —

"Plaintiff further avers that it had a full and complete defense to said action as against said policy of insurance, and was under no obligations to repay the same; that the said Carter had obtained said policy by fraud and misrepresentations, and that said loss was not a *bona fide* loss, of all which facts they informed their said attorneys (giving names) and instructed and directed them to plead and so make appearance in said cause; that said Carter failed to furnish to said company proper proofs of said loss, as required by the rules of said company, and by the terms and conditions of said policy of insurance; that said insurance company was fully prepared to successfully defend said claim of said Carter of said loss, and fully intended to do so, and so instructed their said attorneys."

It will be observed that there is no statement of facts showing the nature of the defense of the plaintiff against the payment of the loss. This was necessary in order to entitle the plaintiff to relief. Where a court of equity proceeds to set aside a judgment at law, it proceeds upon equitable considerations only. If the judgment rendered is not inequitable as between the parties, no matter how irregular the proceedings may be, a court of equity will not interfere: 10 Am. & Eng. Ency. of Law, 898.

It must appear that on a re-examination and retrial of the cause the result would probably be different: 3 Pomeroy's Eq. Jur., sec. 1364; *Bradley v. Richardson*, 23 Vt. 720; *Tomkins v. Tomkins*, 11 N. J. Eq. 512, 514; *Reeves v. Cooper*, 12 N. J. Eq. 223; *Dawson v. Merchants' etc. Bank*, 30 Ga. 664; *Saunders v. Albritton*, 37 Ala. 716; *Way v. Lamb*, 15 Iowa, 79, 83; *Stokes*

v. *Knarr*, 11 Wis. 389; *Payne v. Dudley*, 1 Wash. (Va.) 196; *Sauer v. Kansas*, 69 Mo. 46; *Lemon v. Sweeney*, 6 Ill. App. 507.

Neither the statement of facts in the petition nor the proof is sufficient to show that the judgment is unjust, or that the plaintiff had any defense to the action. So in regard to the proofs of loss. It is not stated wherein they are defective, nor that the plaintiff has not waived the defect.

There is testimony in the record tending to show that the plaintiff had no defense to the action, and simply employed attorneys to secure a dissolution of the injunction, and that the contest was really between creditors of Carter. These were disputed questions of fact, which were submitted to the trial court, and the evidence being nearly equally balanced, the judgment must be sustained.

We desire to say, however, that if the plaintiff had a defense to the action on the policy, the attorneys for the defendant, nor either of them, could consistently appear for the plaintiff and should not have done so; but in the condition of the record this fact cannot be determined.

The judgment of the district court is affirmed.

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**JUDGMENT — INJUNCTION TO RESTRAIN — WHEN WILL ISSUE.** — Courts of equity do not interfere to correct errors of law, but they will interpose upon equitable grounds to do justice when, from their organization or otherwise, the common-law tribunals are incapable of rendering it: *Gregory v. Ford*, 14 Cal. 188; 73 Am. Dec. 639, and note. Equity will enjoin the enforcement of a judgment if any fact exists which clearly shows it to be against conscience to execute it, and of which the injured party could not have availed himself in the original action: *Hibbard v. Eastman*, 47 N. H. 507; 93 Am. Dec. 467, and note; *Pollock v. Gilbert*, 16 Ga. 398; 60 Am. Dec. 732, and note. A court of equity will restrain the enforcement of a judgment where the defendant had a good defense and was unable to present it: *Rice v. Tobias*, 89 Ala. 214; *Ballow v. Wichita County*, 74 Tex. 339; *Rosenberger v. Bowen*, 84 Va. 660; *Procter v. Pettitt*, 25 Neb. 96.



**DONISTHORPE v. FREMONT, ELKHORN, AND MISSOURI VALLEY RAILROAD COMPANY.**

[30 NEBRASKA, 142.]

**DEEDS — EVIDENCE TO SHOW PURPOSE OF.** — Although the execution of a deed merges all prior conversations and statements of the parties, yet the purpose for which it was made may afterwards be shown by parol evidence.

**DEEDS — RIGHT OF WAY — EVIDENCE TO SHOW PURPOSE OF.** — Where a railroad company obtains a deed to a right of way, under representations that it is designed for the main line, and not for side-tracks, and it is afterwards used for side-track purposes, parol evidence is admissible to show the purpose for which the deed was executed.

**DEEDS — RIGHT OF WAY — SPECIAL DAMAGES — INJUNCTION.** — Where a railroad company has obtained a deed to a right of way under representations that it is to be used for main-line purposes alone, and it is afterwards used for side-tracks, such use will not be enjoined. The grantor is, however, entitled to recover damages for the injury sustained in excess of those which arise from the proper use of the principal line of the road.

*F. B. Donisthorpe and Robert Ryan*, for the appellants.

*John B. Hawley and J. Jensen*, for the appellee.

**MAXWELL, J.** This action was brought by the plaintiffs against the defendant to abate certain stock-yards near their residence as a nuisance, and to enjoin the defendant from using certain side-tracks near their residence for the same cause; or, in case an injunction would not be granted, then to recover damages.

On the trial of the cause the court below granted an injunction in effect abating the stock-yards, but found for the defendant as to the side-tracks, and rendered judgment accordingly. Other matters were presented to the court below which do not seem to be involved in the issues before us, and therefore will not be considered. No appeal has been taken from the judgment abating the stock-yards, so that the only question presented for consideration is the correctness of the judgment as to the right of way.

It appears from the record that in the spring of 1887, the defendant was anxious to extend its road to Geneva and beyond, and after various conferences with the citizens of Geneva, they entered into a written guaranty that the right of way, from "the east line of the northeast quarter of section 36, township 7 north, of range 8 west, of the sixth principal meridian, and for station-grounds at Geneva certain lots and alleys, and a portion of Lincoln Street in said Geneva," should not cost to

exceed thirteen thousand five hundred dollars; that one Stanley was the right of way agent of the defendant, and he exhibited to the plaintiffs a map purporting to show the line of the road through the town of Geneva and across their lots. He stated in effect that the side-tracks would not extend to the plaintiff's place, and evidently relying upon this assurance, the citizens of the town made similar statements. The B. & M. R. R. runs south through the tier of blocks next west of the plaintiff's residence, the side-tracks, however, being some distance away. The testimony shows that the wife of F. B. Donisthorpe, one of the plaintiffs, stated that if she could be assured that the side-tracks of the defendant would also be placed away from near their residence, she would execute the deed as desired. Upon securing such assurance, she thereupon with her husband executed a deed as follows:—

"This indenture, made this eighth day of April, A. D. 1887, between Frederick B. Donisthorpe and Laura V. Donisthorpe (his wife), in her own right, of the county of Fillmore, in the state of Nebraska, party of the first part, and the Fremont, Elkhorn, and Missouri Valley Railroad Company, a corporation duly organized under the laws of the state of Nebraska, party of the second part, witnesseth:—

"That whereas, the said Fremont, Elkhorn, and Missouri Valley Railroad Company, party of the second part, is now constructing a railroad, which said railroad is to pass through the county of Fillmore, in said state of Nebraska, and the said party of the first part, being desirous of the construction of said railroad, and to aid the same by the grant herein made, in consideration of the premises, and the sum of \$750 to them in hand paid, the receipt whereof is hereby acknowledged, have given, granted, bargained, sold, conveyed, and confirmed, and by these presents do give, grant, bargain, sell, convey, and confirm, to the said party of the second part, and to its successors and assigns forever, for the purpose of constructing a railroad thereon, and for all uses and purposes connected with the construction and use of said railroad, a strip of land fifty feet in width, being fifty feet in width on west side of the center line of said railroad where the same has been definitely located over and across lots 15, 16, and 17, in W. J. Tate's first addition to the village of Geneva, Fillmore County, Nebraska, of the sixth P. M.; and the said party of the first part, for the consideration aforesaid, do hereby release and discharge the said party of the second part, its successors and assigns, from

all costs, expenses, and damages which the said party of the first part has now sustained, or shall at any time hereafter sustain, in any way, by reason of the construction, building, or use of the said railroad; to have, hold, and enjoy the lands above conveyed, with the appurtenances and privileges thereto pertaining, and the right to use the said land and material of whatsoever kind within the limits of the said fifty feet above conveyed, unto the said party of the second part, the Fremont, Elkhorn, and Missouri Valley Railroad Company, and to its successors and assigns forever, for any and all uses and purposes connected with the construction, preservation, occupation, and enjoyment of said railroad; provided, that if said railroad shall not be located and graded within ten years from the date hereof, or if, at any time after said railroad shall have been constructed, the said party of the second part, its successors or assigns, shall abandon said road, or the route thereof shall be changed so as not to be continued over said premises, the land hereby conveyed, and all rights in and to the same, shall revert to the said party of the first part, their heirs and assigns.

“And the said party of the first part do for themselves, their heirs, executors, administrators, and assigns, covenant and agree to and with the said party of the second part, its successors, and assigns, that they are the true, lawful, and rightful owners of all and singular the above granted and described premises, and every part and parcel thereof, with the appurtenances, and are now lawfully seized and possessed of the same as a good, perfect, and absolute estate of inheritance in fee-simple; and that the same or any part thereof at the time of signing and delivery of these presents are not in any manner encumbered; and also that the said party of the first part and their heirs will and shall warrant and forever defend all and singular the lands and premises hereby conveyed unto the said Fremont, Elkhorn, and Missouri Valley Railroad Company, the said party of the second part, its successors and assigns forever, against the lawful claims and demands of all and every person and persons, free and discharged of and from all manner of encumbrances whatsoever.

“In testimony whereof, the said party of the first part have hereunto set their hand the day and year first written above.

“F. B. DONISTHORPE.

“LAURA V. DONISTHORPE.

“Signed and delivered in presence of

“JNO. D. CARSON.”

Upon the construction of the line, three side-tracks were built by the defendant, which extend beyond the plaintiff's residence, and such residence, being so near the side-tracks, is greatly affected by the switching of cars thereon. As there must be a new trial to ascertain the amount of damages which the plaintiff has sustained, and as no question is involved as to the rule for estimating the damages, we will not discuss that branch of the case.

The attorneys for the defendant insist that the deed merged all prior conversations and statements of the parties, and therefore the plaintiffs cannot now complain, as there is no reservation in the deed. This is true, but notwithstanding the rule, the purpose for which the deed was made may be shown: *Collingwood v. Merchants' Bank*, 15 Neb. 121. This rule is constantly applied where an absolute conveyance is made as security for a debt. In such and like cases the entire transaction may be shown in order to determine the effect of the conveyance. So in the case at bar. Here the professed purpose of the agent was to obtain a conveyance of the right of way for the line of the road, — not for depot-grounds and side-tracks. It is well known, too, that the grounds required for a station and the consequent side-tracks are usually much wider than along the line of the road away from the station. This, however, is a mere circumstance, which to have any weight must be supported by other circumstances showing that the company usually required more than one hundred feet in width for side-tracks at its stations. While every reasonable facility should be given a railway company organized under the laws of the state to acquire the right of way, and to construct its road, yet the land and lot owners over which its line is located have rights in the premises which must be considered and protected, and the damages which they each sustain by reason of the location, proper construction, and careful operation of the road must be paid or deposited with the county judge. Justice and fair dealing require that a fair compensation be paid, and that there shall be no secret reserve in favor of the party acquiring the right of way. The side-tracks having been constructed, an injunction will not be granted, but the plaintiffs will be entitled to recover damages for the injury sustained in excess of those which arise from the proper use of the principal line of the road.

The judgment is therefore reversed, and the cause remanded for further proceedings.

**DEEDS — ADMISSIBILITY OF PAROL EVIDENCE TO SHOW WARRANTY OUTSIDE OF:** See extended note to *Gress v. Bateson*, 5 Am. St. Rep. 199-201. Parol evidence is not admissible to show that the terms upon which a deed was executed were totally different from those expressed in the deed: *Adams v. Hudson County Bank*, 10 N. J. Eq. 535; 64 Am. Dec. 469, and note; *Worrell v. Munn*, 5 N. Y. 229; 55 Am. Dec. 330; *Skinner v. Hendrick*, 1 Root, 253; 1 Am. Dec. 43, and note.

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## HAWKE v. EUYART.

[80 NEBRASKA, 149.]

**WILLS — CODICIL AS REPUBLICATION.** — Where a codicil to a will is so executed as to operate a republication of the will, both will be read and construed together as one entire instrument, and the will will be considered as of the date of the codicil.

**WILLS — DEVISE UPON CONDITION THAT DEVISEE SHALL REFORM.** — A condition attached to a devise in a will, providing that the devisee named shall only take thereunder, if, at the expiration of ten years from the death of the testator, the devisee shall have become, in the judgment of the executors of the will, permanently and thoroughly reformed of intemperate habits, immoral consortings and associations, and should then be living with evident promise to continue to live virtuous and temperate for the remainder of his life, is valid and binding on the executors and on the devisee, and will be upheld.

**WILLS — DEVISE TO DESTROY MARRIAGE — PUBLIC POLICY.** — A condition attached to a devise by a father to his son, that the devisee shall be entitled to take under the will only when the executors thereof are satisfied that he has permanently freed himself of all influences, connections, associations, cohabitations, and relations, of every name, character, and description, with a certain woman named, to whom he was married at the time of the execution of the will, is void, as being against public policy, and in restraint of the marriage relation and its continuance, and the devise is operative to the same extent as though such condition had not been written in the will.

*John C. Watson, Frank P. Ireland, and L. W. Billingsley,*  
for the appellant.

*M. L. Hayward,* for the appellee.

**COBB, C. J.** The appellant alleged in his petition to the county court of Otoe County that he was the son and heir at law of Robert Hawke, late of said county, deceased, whose last will was offered for probate by Logan Euyart and George W. Hawke, executors named therein, and that he appeared and objected to the probate of said will, for the reasons, — 1. That no citation of notice was issued or served upon him; 2. That the paper purporting to be the last will and testament of deceased was not his will, but was obtained and procured by

circumvention and by ruse on the part of Logan Euyart, one of the executors; that the will is void so far as appellant is concerned, as in absolute restraint of marriage and against public policy, and that deceased was not, at the time of making it, of sufficient testamentary capacity to make a will, and that the contingency upon which its bequest to appellant was to take effect was too remote.

The appellant asked that if the will be admitted to probate, the estate depending upon the marriage condition of appellant be ordered to immediately take effect, absolved from the condition imposed, and that he be entitled to the property willed to him.

Notice having been given by publication of the motion to admit the will to probate, there was a hearing in the county court on June 20, 1887. Nathaniel Adams and Willian F. N. Houser were sworn and examined as witnesses to the will, and the court found that the will and the several codicils thereto were duly executed by Robert Hawke, who was, at the time of executing the same, of full age, of sound mind and memory, and not under restraint or under influence of any kind, and was competent in all respects to devise real and personal estate; that said instrument is the last will and testament of said deceased, and ought to be allowed as such, and that the persons therein named as executors are appointed as such upon giving bond in the sum of thirty thousand dollars, with sufficient sureties, in accordance with the statute.

To all of which the appellant objected, and took his appeal to the district court.

There was a stipulation by the parties, proponents and contestant, that the appeal should apply and extend only to the matter of the bequest to William Hawke, and should not in any way affect the other devisees and legatees of the estate, the contestant asking no greater amount than is given him in the will, and he appeals only from the conditions and restrictions attached to such bequest.

There was a trial in the district court, July 10, 1888, in which the proceedings of the county court were affirmed, and the petition of the appellant was dismissed, to which exceptions were taken, and the appeal brought into this court.

The bequest to appellant under the will dated February 16, 1884, is as follows: —

“Item Third. I give, devise, and bequeath to the executors of this my will, hereafter nominated and appointed, and to the

survivors or survivor of them, all that certain piece or parcel of land situate in the county of Otoe, and state of Nebraska, known and described as the northwest quarter of section six, township eight north, of range fourteen east, of the sixth principal meridian, containing one hundred and seventy-four and one half acres, more or less, together with the tenements, hereditaments, and appurtenances to the same belonging, or in any wise appertaining, and the sum of ten thousand dollars in money in trust, nevertheless, and to and for the uses, interests, and purposes hereinafter limited, described, and declared; that is to say, upon the trust that my said executors, the survivors or survivor of them, shall, within six months after my decease, enter into and upon the above-mentioned and last-described lands and tenements, and lease and to farm let the same to a good, careful, capable, honest, and industrious tenant or tenants, on such terms and conditions as my said executors, or the survivors or survivor of them, shall deem meet and just, and out of the rents and profits arising from said lands, first pay and discharge all taxes, revenue, duties, and assessments of every name and nature legally imposed, levied, and assessed thereon.

"Second. Make all necessary and proper repairs to the buildings, fences, and inclosures, including painting of buildings, and pruning of all orchards, trees, and shrubs growing on said premises, and embracing the replanting of fruit-trees if destroyed by the elements, to the extent of preventing the premises deteriorating in value or going to waste; and any balance of such rents, issues, and profits remaining, to invest in some good six-per-cent-interest-bearing security issued by Otoe County, in the state of Nebraska, or in securities issued by said county legally bearing a greater rate of interest than six per cent per annum; and in like securities my said executors, or the survivors or survivor of them, are hereby directed to invest the said sum of ten thousand dollars, and the income thereupon, less such sum or sums as shall be required to pay the taxes and assessments levied and assessed on the trust funds so held by them as aforesaid, to be in like manner invested from time to time, for the period of ten years from the time of my decease. In the event my executors shall not be able to procure the class of securities above mentioned for the investment of such trust funds, then they, or the survivors or survivor of them, may invest such trust funds, and the accumulations therefrom, in bonds or other securities legally issued



by the state of Nebraska, bearing at least six per cent per annum interest, or in bonds or in promissory notes secured by a first mortgage on lands situate in Otoe County, under improvement, as farms, of at least double the value of the amount of the mortgage, exclusive of the buildings, fences, and inclosures, bearing interest at not less than seven per cent per annum, payable annually. And in case, at the end of ten years from my decease, my son William Hawke shall have become, in the judgment of my said executors, the survivors or survivor of them, permanently and thoroughly reformed of his intemperate habits, of his immoral consortings and evil associations, and shall then be living, with evident promise to continue so to live during the remainder of his life, a virtuous, industrious, temperate, and commendable life, then and thereupon, within twelve months after the expiration of ten years from my decease, my said executors, the survivors or survivor of them, are hereby directed and required to convey the lands and premises hereinabove last mentioned in item third of this my last will and testament, with the tenements and appurtenances, to my said son William Hawke, and pay over, assign, transfer, set over, and deliver to him, my said son William Hawke, the securities held by them, or by either of them, together with all moneys, rents, interest, and profits, representing the said sum of ten thousand dollars held in trust as aforesaid, and the unexpended income arising therefrom, and the net rents, issues, and profits of said real estate during said period; *provided, nevertheless, further*, that such trust property and funds shall not be transferred by my said executors, or by the survivors or survivor of them, until my said executors, or the survivors or survivor of them, shall have satisfactory proof and evidence that my said son William Hawke has permanently freed himself from all influence, connections, associations, cohabitations, and relations, of every name, character, and description, of and with a certain notorious and disreputable woman, known by the name of Mrs. Sadie Gladstone, and with all relatives, friends, and intimates of that woman. It being my imperative command that no part, parcel, or portion of such trust funds, or of any other part or portion of my worldly goods or estate, shall come to the hands of, or be used or applied for the use or benefit of, said woman, Sadie Gladstone, under any circumstances or conditions whatsoever.

*“And provided further*, that in the event my said son William Hawke should, at any time before the expiration of ten

years from my death, through illness or otherwise, become so impoverished as to be liable to become a public charge, then my executors, or the survivors or survivor of them, are authorized and empowered, out of the rents, issues, and profits, and the income of said trust property and trust funds, from time to time, to afford and provide him such reasonable, necessary support and raiment as they shall deem just and proper under the circumstances, but they are not to furnish any money or other means to gratify the cravings for intoxicating liquors or for immoral associations. . . .

“But in the event of my said son William Hawke shall leave issue of his body him surviving, born of a respectable maternal parent in lawful wedlock, and not born of the said Mrs. Sadie Gladstone, then I order, direct, and require my said executors, the survivors or survivor of them, to use, from time to time as they may deem proper, out of the rents, issues, and profits and income of said trust property and trust funds, to afford a comfortable support, including raiment and education, for such child or children of my said son William Hawke, until such child or children shall attain the age respectively of twenty-one years, and upon reaching that age, or marrying, if a female or females, my executors are authorized and empowered to make such reasonable advancement, in their discretion, as the circumstances and position in life of such child or children of my said son William Hawke shall seem to justify out of the profits and income which have arisen from such trust property and trust funds, and upon attaining the age of thirty-three years respectively, said real estate and funds so held in trust as aforesaid, to be divided, share and share alike, less any advancement made from each share respectively, between such children of my said son and their heirs by representation; *provided, always*, that my executors, or any of them, shall not, with any funds, money, or property coming from my estate, aid, maintain, or support, or assist therein, directly or indirectly, any child or children by my son begotten on the body of the said notorious and disreputable woman, Mrs. Sadie Gladstone, whether born in lawful wedlock or not.

“And if the heirs of his body surviving my son William Hawke shall be born of the body of the said Sadie Gladstone, then said trust property and trust funds shall be distributed and disposed of by my said executors as hereinabove directed, the same as if my said son William Hawke had died without issue him surviving.

"In the event my son William Hawke should fail to reform his intemperate habits, and from his immoral consortings and evil associations, or otherwise refuse to comply with the conditions upon which my executors are authorized and required to convey the real estate described and the ten thousand dollars, with the net rents, issues, profits, and income thereof mentioned in this item third of my last will and testament, then and in that case it is my will, and I order and direct my said executors to hold said premises and trust funds, with the net accumulation therefrom invested and rented as aforesaid, and out of the proceeds thereof, from time to time as required, use sufficient, if my said son's circumstances shall require it, to pay and discharge the expenses for a comfortable maintenance and support during his natural life, or until he shall have complied with all the conditions and furnished the evidence to entitle him to a conveyance and assignment from my said executors to said trust property and trust funds, with the accumulation thereof, as is hereinabove provided and directed, when, although more than ten years shall have passed since my decease before the conditions aforesaid have been complied with by my said son William Hawke, my said executors, the survivors or survivor of them, will and shall convey and assign said trust property and trust funds, and the accumulations therefrom, upon the express condition, however, that such conveyance and assignment of said property and trust funds, and the accumulations therefrom, shall be void, and the property thereby conveyed and assigned shall revert to my said executors, the survivors or survivor of them, or to my said wife and daughters, if all my executors shall then be dead, they thereupon shall be repossessed thereof, the same as if said conveyance and assignments had never been made, if my said son William Hawke shall, at any time after the execution and delivery of said conveyance and assignment, marry or cohabit with the said notorious and disreputable woman, Mrs. Sadie Gladstone, and he, my said son William Hawke, having failed or refused to comply with such conditions, and failed to receive a conveyance and assignment of such trust property and trust funds, after the death of my said son William Hawke, my said executors, the survivors or survivor of them, are directed and required to distribute such trust property and trust funds, with their accumulations, to my wife, Elizabeth A. Hawke, and daughters, Ella Spencer, Lulu Hawke Rector, and Minnie Hawke, and to their heirs by representation, share and share

alike, at the time and in the manner hereinabove directed; *provided*, no part thereof shall descend to the heir or heirs of my son William Hawke begotten on the body of the said Sadie Gladstone."

The first codicil to the will of Robert Hawke was executed on July 29, 1885, and the second and last codicil is dated March 8, 1887, so that the last date is the completion and publication of the will. It will be observed that the devises to and provisions in favor of the appellant are made to depend upon certain conditions. These are, first, that at the expiration of ten years from the death of the testator the appellant should have become, in the opinion and judgment of the executors, permanently and thoroughly reformed of intemperate and evil habits, his immoral consortings and associations, and should then be living, with evident promise to continue to live for the remainder of his life, a virtuous, temperate, and commendable life.

Second, that the executors should have satisfactory proof and evidence that the appellant had permanently freed himself of all influences, connections, associations, cohabitations, and relations, of every name, character, and description, with Mrs. Sadie Gladstone.

After the argument of this case, and at the consultation of the court, we were all of the opinion that the first conditions imposed in the testator's will were valid and binding on the executors and on the legatee; but that those of the second class, in view of the facts and circumstances given in evidence, were void, as against the public policy of the state, and could not be sanctioned.

While the will itself was executed and bears date of February 16, 1884, there is a codicil to it, which, to all intents and legal purposes, republished and executed the will on the twenty-ninth day of July, 1885.

It appears from the bill of exceptions, and is not disputed, that the appellant was married to Mrs. Sadie Gladstone on the 16th of September, 1884. It is to be mentioned, not as a controlling fact, that while there is an entire absence of direct evidence on the subject, yet from all the evidence, and from the legal inferences to be drawn, there is a strong presumption that the marriage of the appellant with Mrs. Gladstone was known to the testator at the time of the last publication of his will. That condition had taken its place for two years and six months prior to the last fact. As to the rule in this in-

stance, see *Van Cortlandt v. Kip*, 1 Hill, 590: "Where a codicil is so executed as to operate a republication of the will, both should be read and construed together as one entire instrument." See also *Brimmer v. Sohler*, 1 Cush. 118; *Neff's Appeal*, 48 Pa. St. 501; *Den ex dem. Snowhill v. Snowhill*, 23 N. J. L. 447.

The question, then, is not wholly whether the exactions of the will that the appellant shall have freed himself of all the influences and associations of Mrs. Gladstone, but are in restraint and in the continuation of the marriage relation, the same having been entered into as stated.

I think there can be no doubt, either as a question of reason from moral premises, or of legal authority, not only that such condition is void, but having been declared void, it leaves the bequest of the testator operative the same as though the condition had not been sought to be made by will: See Roper on Legacies, 757, and cases cited; *Conrad v. Long*, 83 Mich. 78; *Wren v. Bradley*, 2 De Gex & S. 49; *Brown v. Peck*, 1 Eden, 140; *Tennant v. Braie*, Tothill, ed. 1820, 77.

These authorities, cited by counsel for appellant, are directly to the point stated, and seem to be conclusive of it. Had the devisee not been lawfully married at the date of the last publication of the will of the testator, I should be of the opinion that, under the arguments and authorities of the counsel for appellees, the peculiar conditions of the will here considered would be upheld; but wholly otherwise when the marriage had been solemnized before the publication of the will.

The decree of the district court is reversed, and the cause is remanded, with a direction to that court to enter a decree in accordance with this opinion.

Judgment accordingly. —

**WILLS — CODICIL AS REPUBLICATION.** — A testator signing and publishing a codicil in the presence of witnesses republishes his will, and both together are but one will: *Harvey v. Chouteau*, 14 Mo. 587; 55 Am. Dec. 120, and extended note.

**DEVISE — CONDITIONS IN RESTRAINT OF MARRIAGE.** — A condition in a will in restraint of marriage generally is void, as against public policy and good morals: *Little v. Birdwell*, 21 Tex. 597; 73 Am. Dec. 242, and note; extended note to *Coppage v. Alexander*, 38 Am. Dec. 156.

**CONTRACTS — CONSIDERATION FOR PROMISE — WHAT SUFFICIENT.** — A promise by an uncle to a nephew, that if the latter would refrain from drinking liquor, using tobacco, swearing, and playing cards or billiards for money until he should become twenty-one years of age, he would pay him five thousand dollars, is founded on a good consideration, and will be upheld: *Hamer v. Sidway*, 124 N. Y. 538; 21 Am. St. Rep. 693, and note.

# OMAHA AND NORTH PLATTE R. R. Co. v. JANECEK.

[30 NEBRASKA, 276.]

**EMINENT DOMAIN — SPECIAL DAMAGES WITHOUT ACTUAL TAKING.** — Where the property of a person has been specially depreciated in value, in excess of the injury sustained by the community at large, by reason of a public improvement, he is entitled to compensation in damages for such depreciation, although no part of his property is actually taken.

**EMINENT DOMAIN — SPECIAL DAMAGES — OPERATION OF RAILROAD.** — Where an owner has sustained special damages by the construction and operation of a railroad near his land and in close proximity to his house, in excess of the damages sustained by the public generally, he is entitled to recover compensation therefor; and the noise, jar to his building, smoke, soot, and cinders from passing engines and trains are proper elements of damage.

*W. S. Russell, and Marquett and Dewese*, for the plaintiff in error.

*Phelps and Sabin*, for the defendant in error.

**NORVAL, J.** The defendant in error brought this action in the district court of Colfax County, to recover damages for the depreciation in value of his property, caused by the construction and operation of the Omaha and North Platte railroad in front of his premises. The case was tried to the court, who rendered a judgment for the plaintiff for the sum of fifteen hundred dollars.

It is fully established by the testimony that the railroad company purchased blocks 2 and 15 in the town of Schuyler, and constructed its main track and switches thereon; that on the east part of block 15 it erected an engine-house, a turn-table, and a coal-shed. At the time of the location of defendant's road the plaintiff was the owner of block 16, which is immediately east of block 15, being separated by Atlantic Street. The plaintiff also owns between three and four acres of land adjoining said block 16 on the south. The plaintiff's residence is located on the west part of said block 16, and within eighty feet of the engine-house. No part of Atlantic Street was taken by the railroad company for any purpose. All the evidence shows that in moving trains over the main and side tracks, and at the roundhouse, noises are made by the ringing of the bells and sounding of the whistles; that the engines of the defendant throw soot, smoke, and cinders upon plaintiff's property, and that the passing of trains shakes plaintiff's house, which damaged and depreciated the value of his property. The evidence establishes that the property has been depreciated in

value in the sum of fifteen hundred dollars, by reason of the construction and operation of the railroad in such close proximity to plaintiff's premises.

The plaintiff's right to recover is based upon section 21, article 1, constitution of this state, which provides that "the property of no person shall be taken or damaged for public use without just compensation therefor." It has become the settled law of this state, that under this provision of our constitution it is not necessary that any part of an individual's property should be actually taken for public use in order to entitle him to compensation. If the property has been depreciated in value by reason of the public improvement, which the owner has specially sustained, and which is not common to the public at large, a recovery may be had. In the case at bar the plaintiff's property is depreciated in value by the noise caused by the operation of the defendant's engines and cars in front of his premises and in close proximity to his house, by the casting of soot, smoke, and cinders upon his property, and by the vibration of his house. The plaintiff has sustained special damages by the construction and operation of the railroad near his premises, in excess of that sustained by the community at large. Smoke, soot, and cinders are not thrown upon property situate a few blocks from the road, nor does the moving of trains jar buildings that are distant from the track. The fact that the property of a dozen or more owners in the town is materially injured by the location of the defendant's roads does not affect the plaintiff's right to compensation for the depreciation in value of his property. If, in consequence of the building of a railroad into a town, new towns spring up which divert trade from the old town, and property therein depreciates in value, for such depreciation no recovery can be had. It is an injury or damage each property holder has sustained in common with the public generally.

It is claimed that the district court allowed this kind of damages in this case, and none other. True, there is testimony in the record before us tending to show that property generally in the town of Schuyler, since the construction of the road, has depreciated in value, but this falling off in value was not taken into consideration by the court in assessing damages in this case. The evidence fails to disclose that any such general depreciation had taken place immediately after the construction of the defendant's road, and that is the date the witness estimates the value of the property, and not at the



date of the trial. Had the value of plaintiff's property at the time of the trial been given, then there would have been just grounds for complaint.

A similar question was considered in the case of *Blakeley v. Chicago etc. R'y Co.*, 25 Neb. 207, where it was held that it was competent to take into consideration noise and confusion incident to the operation of trains, in estimating the value of real estate after the construction of the road.

The *Chicago etc. R'y Co. v. Hazels*, 26 Neb. 364, was an action to recover damages alleged to have been sustained by Hazels by the reason of the construction of a railroad in close proximity to his property. Smoke, dust, and soot from engines, the ringing of bells, sounding of whistles, and noise of the trains depreciated the value of his property. It was held in that case that all elements caused by the construction of the road which tend to diminish the value of property could be taken into consideration.

This view is supported by *Elizabethtown etc. R. R. Co. v. Combs*, 10 Bush, 382; 19 Am. Rep. 67; *Galveston etc. R'y Co. v. Eddins*, 60 Tex. 656; *Lahr v. Metropolitan etc. R'y Co.*, 104 N. Y. 268; *Baltimore etc. R. R. Co. v. Fifth Baptist Church*, 108 U. S. 317; *Cogswell v. New York etc. R. R. Co.*, 103 N. Y. 10; 57 Am. Rep. 701; *Kansas etc. R. R. Co. v. Kregelo*, 32 Kan. 608; *Drucker v. Manhattan R'y Co.*, 106 N. Y. 157; 60 Am. Rep. 437; *Chicago etc. R'y Co. v. Ayres*, 106 Ill. 511.

In *Columbus etc. R'y Co. v. Gardner*, 45 Ohio St. 316, the supreme court of Ohio, in considering the question involved in the case at bar, says: "While it may be conceded that in estimating the plaintiff's damages the jury would not be permitted to take into account the consequences of the operation of the railroad which were common to the community at large, no sound reason exists for excluding from their consideration such elements of inconvenience, annoyance, danger, and loss as result to the property, its use and enjoyment, from the smoke, noises, and sparks of fire occasioned by running of locomotives and cars along the track in front of the same, if it be shown that these caused special injury and depreciation to the property."

The rule established by the decisions of this court, and by the recent adjudicated cases of most of the other states, is to the effect that if the property of an individual has been depreciated in value by reason of smoke, soot, and cinders being

thrown upon his property by passing engines, he may recover the damages thus sustained.

The judgment of the district court is affirmed.

**EMINENT DOMAIN—DAMAGE WITHOUT TAKING.**—The construction and operation of a railroad in front of the property of an abutting owner without his consent, and without his being compensated, is an invasion of his rights for which he may recover damages: *Theobald v. Louisville etc. R'y Co.*, 66 Miss. 279; 14 Am. St. Rep. 564, and note. When the fee of an abutting owner is not sought to be taken for a railway, he cannot enjoin its construction merely because the damages to his premises are not compensated in advance, provided the company act under sufficient legislative and municipal authority: *Denver etc. R'y Co. v. Domke*, 11 Col. 247; contra, see *Harbach v. Domainess etc. R'y Co.*, 80 Iowa, 593.

**RAILROADS—DAMAGES FOR OPERATION OF, IN FRONT OF PREMISES.**—Whenever, without the consent or without compensation to an abutting owner, a railroad is operated along a street in front of his premises, so as, along that part of the street, to cause smoke, dust, and cinders, which darken and pollute the air, he may recover whatever damages are so caused to his lot: *Adams v. Chicago etc. R. R. Co.*, 39 Minn. 286; 12 Am. St. Rep. 644, and note; *Stone v. Fairbury etc. R. R. Co.*, 68 Ill. 394; 18 Am. Rep. 556. But such action cannot be maintained where the railroad is being prudently operated on its own land or upon land in which the abutting owner has no interest: *Carroll v. Wisconsin Cent. Co.*, 40 Minn. 168; *Dunmore v. Central etc. R'y Co.*, 72 Iowa, 182.

## GERMAN INSURANCE COMPANY v. HEIDUK.

[30 NEBRASKA, 282.]

**INSURANCE—LIMITATIONS ON POWERS OF AGENT.**—An insurance company may limit or restrict the powers of its agent, and when such restrictions are known to the person dealing with such agent, the company is bound only by acts of the agent within the scope of the authority conferred.

**INSURANCE—ADDITIONAL INSURANCE—WAIVER BY AGENT.**—When a policy of insurance contains a condition against additional insurance, without the written consent of the company, and also a condition that no notice to, and consent or agreement by, any local agent shall constitute a waiver of, or affect any condition in, the policy until such consent or agreement is indorsed thereon in writing, the local agent of the insurance company has no authority to verbally waive any of the conditions in the policy. His oral consent to additional insurance will not bind the company, and such insurance renders the policy void.

**INSURANCE—LOSS—ADDITIONAL INSURANCE—MEASURE OF DAMAGES.**—Where a policy of insurance provides that, in the event of other or additional insurance, the assured shall recover no greater proportion of the loss than the sum named in the policy bears to the total amount of the insurance, proof of additional insurance, and that the loss is less than the total amount of insurance, will limit the recovery of the assured to the sum stipulated for in the policy, and he is not entitled to recover the market value of the goods destroyed.

*Dickey and Heiskell, Uriah Bruner, and J. C. Crawford, for the plaintiff in error.*

*T. M. Franse, E. K. Valentine, and M. McLaughlin, for the defendant in error.*

NORVAL, J. This is an action upon a policy of insurance issued by the defendant June 1, 1887, for one year. The insurance was for fifteen hundred dollars upon the plaintiffs' stock of clothing and gents' furnishing goods, situated at West Point, Nebraska. On the twenty-sixth day of November, 1887, while said policy was in full force, the property was totally destroyed by fire. The petition is in the usual form. The policy sued on is attached to the petition, and contains this written clause: "Four hundred dollars other insurance concurrent herewith only permitted." The defendant by its answer admits the execution and delivery of the policy, and denies all other allegations of the petition. The defendant, as a second defense, alleges "that said policy of insurance, described in the petition, is in the regular form of policies issued by this defendant, and that the plaintiffs accepted and received said policy with a full knowledge of the contents thereof.

"Defendant further avers that said policy contains a certain provision in the following words and figures, to wit: 'Four hundred dollars other insurance concurrent herewith only permitted'; and defendant further avers that on or about the first day of June, A. D. 1887, these plaintiffs placed the full amount of said concurrent insurance allowed by the terms of the policy issued by this defendant with the Germania Insurance Company, which company issued to these plaintiffs their certain policy of insurance for the sum of four hundred dollars on said stock, and one hundred dollars on fixtures in said store, which said policy was in full force and effect from the date thereof to the time and date of said loss by said fire.

"Defendant further avers that said policy of insurance issued by this defendant contains a certain clause in the following words, to wit: 'The insured, under this policy, must obtain consent of this company for all additional insurance or policies, valid or invalid, made or taken before or after the issue of this policy, on the property hereby insured, and for all changes that may be made in such additional insurance, and have such consent indorsed on this policy; otherwise the insured shall not recover in case of loss.'

"Defendant further avers that said plaintiffs, with full

knowledge of the said printed terms, and also of the specific written terms of said policy, purposely and knowingly, and without the knowledge or consent of this defendant company, and in violation of said express terms and provisions, did, on the twenty-fifth day of October, A. D. 1887, make application to the Orient Insurance Company, of Hartford, Connecticut, for a policy of insurance, for the sum of five hundred dollars, on the stock of goods insured by the policy issued by this defendant, and described in the petition, and that on said twenty-fifth day of October, A. D. 1887, said Orient Insurance Company issued and delivered to said plaintiffs their certain policy, No. 802,988, for the sum of five hundred dollars, insuring their stock of goods mentioned in defendant's policy, and described in the petition, against loss or damage by fire, for one year from the date thereof. Said policy so issued by the Orient Insurance Company was in full force and effect at the time said fire occurred, to wit, on the twenty-sixth day of November, A. D. 1887.

"Defendant further avers that the said plaintiffs, by virtue of the foregoing allegations and averments, released this defendant from all obligations and liability under the terms of said policy, No. 528, and the same was void from and after October 25, A. D. 1887."

The plaintiffs filed the following reply:—

"1. The plaintiffs, for reply to defendant's answer in the above action, deny each and every allegation of new matter contained therein.

"2. The plaintiffs allege that the defendant had notice of the additional insurance complained of in its said answer, immediately prior to the issuing of said additional policy of insurance, and the defendant, with full knowledge of all the facts, gave to the plaintiffs its unqualified consent.

"3. That immediately after said policy was issued and delivered to the plaintiffs, they applied to defendant's agent, who issued, signed, and delivered the policy upon which this suit was brought, and requested him to indorse the amount of said additional insurance upon said policy, and said agent then and there assured the plaintiffs that such indorsement was not necessary, and that the policy was all right, and as binding upon the defendant company as though the additional insurance were indorsed thereon.

"4. The defendant is estopped to dispute its liability upon said policy of insurance, or to claim a forfeiture of said policy,

because of the facts set out in paragraphs 2 and 8 of this reply."

To the new matter stated in the reply the defendant interposed a general demurrer, which was overruled by the court. Upon a jury trial the plaintiffs recovered a judgment for \$1,596.25.

The record discloses that the policy in suit was issued by one D. J. Drebert, the local agent of the defendant at West Point, and that at the same time the plaintiffs took out a policy in the Germania Insurance Company for four hundred dollars on the same property, and that subsequently, on the twenty-fifth day of October, 1887, the Orient Insurance Company, of Hartford, Connecticut, at the plaintiffs' request, issued its policy for the sum of five hundred dollars on the stock of goods insured by the policy in suit. The plaintiffs, over the defendant's objections, introduced testimony tending to prove that prior to the issuing of the policy by the Orient Company, Drebert, the local agent of the defendant, verbally consented to such additional insurance, and that after said last policy was written, the plaintiffs exhibited the policy issued by the defendant to Drebert, and requested him to indorse the amount of the additional insurance thereon, and that Drebert replied that "that makes no difference; the policy is good; it need not be changed."

The testimony introduced by the defendant tends to establish that neither the defendant nor Drebert had any knowledge that such additional insurance had been written until after the fire, and did not, verbally or otherwise, consent to such insurance.

On the question of waiver by the defendant of the conditions of the policy relating to additional insurance, the court, on its own motion, gave the following instructions:—

"7. In the policy sued on is a provision permitting four hundred dollars other concurrent insurance, and the condition that the insurer must obtain the consent of the company for all additional insurance taken before or after the issue of said policy on the property thereby insured, and have such consent indorsed on the policy, otherwise the insured shall not recover in case of loss. The court instructs you that if you find from the evidence that the plaintiffs, after receiving the policy from the defendant, and before the loss in question occurred, obtained other insurance in addition to the four hundred dollars concurrent insurance permitted by said policy upon the prop-

erty, which had not expired at the time of the fire, and that no notice thereof was given defendant, its agents or officers, before the fire, or to which the company did not consent, then plaintiffs' policy would be void, and he cannot recover in this suit, and your verdict must be for the defendant.

“8. If you believe from the evidence that Daniel Drebert was the agent of the defendant at West Point for taking applications for insurance, and for writing, issuing, and delivering policies for the defendant company, and that he was notified by the plaintiffs of the additional insurance placed on plaintiffs' property, and that he did not object to the same, or suggest any breach of the condition of the original policy in consequence thereof, then the defendant is estopped from now setting up such additional insurance in avoidance of its policy.

“9. If you believe from the evidence that prior to the time of taking of the additional insurance the plaintiff notified the said Daniel Drebert of his intention to take additional insurance, and the said Daniel Drebert made no objections thereto, but on the contrary told him it was all right, and gave his consent thereto; and if you find from the testimony that immediately after the plaintiff had procured the additional insurance he went to the said Daniel Drebert and informed him that he had taken such additional insurance, and requested the said Daniel Drebert to indorse the amount of the same on the defendant's policy, and that the said Daniel Drebert thereupon told the plaintiffs that it was unnecessary to indorse the amount of said additional insurance on said policy, that it was all right without said indorsement, or words to that effect, and that neither the said agent nor any one else on behalf of the defendant objected to said additional insurance, or notified the plaintiffs that such additional insurance, without the consent of the company being indorsed on the policy, would render or had rendered the policy void,—then the defendant must be deemed to have waived the condition in the policy regarding such additional insurance.”

To the giving of each of these instructions the defendant took an exception. The main points in this case are those raised by the demurrer to the reply, the admission of testimony to establish a waiver of the terms of the policy by the defendant, and the instructions given by the trial court on that branch of the case. The questions thus presented are: Did Drebert, the local agent of the defendant, have any authority to verbally waive the provisions of the policy relating to addi-

tional insurance? and did the notice to such agent estop the defendant after the loss from setting up as a defense the taking of additional insurance?

This court has frequently decided that the conditions inserted for the benefit of the company in a policy of insurance may be waived by it: *Phoenix Ins. Co. v. Lansing*, 15 Neb. 494; *Schone-man v. Western etc. Ins. Co.*, 16 Neb. 404; *Nebraska and Iowa Ins. Co. v. Christensen*, 29 Neb. 572; 26 Am. St. Rep. 407. We adhere to these decisions. In each of those cases, however, the waiver of the terms of the policy was made by an agent who had authority to so bind the company. In this case it is contended that the policy in express terms limits and restricts the authority of the local agent in waiving the conditions of the policy. In addition to the provisions of the policy set out in the defendant's answer, it contains this clause: "The use of general terms, or anything less than a distinct specific agreement, clearly expressed and indorsed on this policy and signed by a duly authorized agent of this company, shall not be construed as a waiver of any printed condition or restriction herein, and no notice to, and no consent or agreement by, any local agent shall affect any condition of this policy until such consent or agreement is indorsed hereon in writing."

It is insisted by the plaintiffs that, notwithstanding the express terms of the policy, Drebert had power to consent by parol to the subsequent insurance. Such authority is not to be found in the printed conditions of the policy. On the contrary, the parties expressly stipulate that "no notice to, and consent or agreement by, any local agent shall affect any condition of the policy until such consent or agreement is indorsed hereon in writing." This language is clearly a direct limitation upon the power of the local agent to bind the company after the delivering of the policy. He was only authorized to waive, change, or modify the policy in a specified manner. The parties agreed that no notice to the local agent should affect the conditions of the policy. The notice given to the agent of the procuring of other insurance did not, therefore, bind the company. To hold that it did would be to ignore the plain contract of the parties. Had the local agent conveyed the information to the managing officer of the company, doubtless the defendant would have been bound, for unquestionably an officer or agent of the defendant whose powers are not limited can waive the terms of the policy without indorsing the same thereon in writing. It cannot be questioned, however,



that an insurance company, as well as an individual, may limit or restrict the powers of its agent, and when such restrictions are known to the person dealing with the agent, the company is only bound by the acts of the agent performed within the scope of the authority conferred: *Havens v. Home Ins. Co.*, 111 Ind. 90; 60 Am. Rep. 689; *Cleaver v. Traders' Ins. Co.*, 65 Mich. 527; 8 Am. St. Rep. 908; *Russell v. Cedar Rapids Ins. Co.*, 78 Iowa, 216; *Hartford F. Ins. Co. v. Wilcox*, 57 Ill. 182; *Hankins v. Rockford Ins. Co.*, 70 Wis. 1; *Knudson v. Hekla F. Ins. Co.*, 75 Wis. 198; *Cleaver v. Traders' Ins. Co.*, 71 Mich. 414; 15 Am. St. Rep. 275; *Merserau v. Phoenix Mut. Life Ins. Co.*, 66 N. Y. 274; *Gladding v. California etc. Ins. Co.*, 66 Cal. 6; *Enos v. Sun Ins. Co.*, 67 Cal. 621.

In *Cleaver v. Traders' Ins. Co.*, 65 Mich. 527, 8 Am. St. Rep. 908, the policy provided that "if the insured shall procure any other or further insurance upon the property insured without the consent of the company written upon the policy, the policy shall become void." The policy also contained this provision: "It is further understood, and made part of this contract, that the agent of this company has no authority to waive, modify, or strike from the policy any of its printed conditions; . . . nor, in case this policy shall become void by reason of the violation of any of the conditions thereof, has the agent power to revive the same." After the delivery of the policy, on representation of the agent issuing the same that it would be all right, additional insurance was placed on the property. The consent of the company to the taking of the additional insurance was not indorsed on the policy. The supreme court of Michigan held that the defendant was not estopped to deny its liability. It is stated in the opinion of Mr. Justice Morse that "when the policy of insurance, as in this case, contains an express limitation upon the power of the agent, such agent has no legal right to contract as agent of the company with the insured, so as to change the conditions of the policy, or to dispense with the performance of any essential requisite contained therein, either by parol or writing; and the holder of the policy is estopped, by accepting the policy, from setting up or relying upon powers in the agent in opposition to limitations and restrictions in the policy."

In *Knudson v. Hekla Fire Ins. Co.*, 75 Wis. 198, the policy contained the usual stipulation found in insurance policies, requiring the assured, in case of loss, to render to the company proofs of loss within thirty days. No proofs of loss were ever

furnished the company, the insured claiming that the same were waived by parol. The policy also provided that "agents have no authority to make any verbal agreement whatever for or on behalf of this company, and this company will not be liable for any such agreement except such as shall be indorsed, signed, and dated in writing on this policy." The court held that the verbal waiver of a condition in the policy, by the local agent who issued the same, is void.

A policy of insurance contained a provision that the property insured should not be encumbered without the written consent of the secretary of the insurance company. Afterwards the insured mortgaged the property, the local agent agreeing to waive the conditions of the policy prohibiting such mortgage. Suit was brought upon the policy, and the supreme court of Wisconsin held that the attempted waiver by the local agent did not bind the company: *Hankins v. Rockford Ins. Co.*, 70 Wis. 1.

We have carefully examined the cases cited by the defendants in error, and find that while many of them are based upon policies containing some of the provisions found in the policy in this case, yet the policies in none of the cases cited in brief of counsel contain an express stipulation limiting the legal effect of a notice given by the insured to the local agent. One of the strongest cases cited by plaintiffs is *Gans v. St. Paul F. & M. Ins. Co.*, 43 Wis. 108; 28 Am. Rep. 535. That policy contained a stipulation that it should be void if the building should become unoccupied without the consent of the company indorsed on the policy. The agent who issued the policy was informed before the fire that the building was unoccupied, and knew that it remained so until it burned. The company refused to pay the loss, because no consent was indorsed on the policy. The policy also contained these conditions:—

"The use of general terms, or anything less than a distinct specific agreement, clearly expressed and indorsed on this policy, shall not be construed as a waiver of any printed or written condition or restriction therein.

"It is further understood, and made a part of this contract, that the agent of this company has no authority to waive, modify, or strike from this policy any of its printed conditions, nor is his assent to an increase of risk binding upon the company until the same is indorsed in writing on the policy and the increase premium paid."

The court held that notice to the agent was notice to the

company. The court in the opinion says: "We find no stipulation in the contract limiting or attempting to limit the legal effect of notice to the agent. The limitations therein contained go only to the acts of the agent. He may not vary, modify, or strike out the printed conditions of the policy, nor assent to an increase of risk, unless the same is indorsed on the policy and the increased premium paid. . . . But there is no stipulation that notice to the agent of a fact relating to the policy shall not operate as notice to the company. What would be the legal effect of such a stipulation we are not called upon to determine, and do not determine."

The difference between the provisions of the policy in the Wisconsin case and those in the case before us is apparent. In our case it is expressly provided that no notice to, and no consent or agreement of, any local agent should affect any condition in the policy until such consent or agreement is indorsed thereon. This language limits the effect of a notice given to the local agent, and of his authority to waive any of the terms of the policy.

In this case it is not shown that the company had any notice that the local agent had been notified of the additional insurance. The testimony offered by plaintiffs to prove that Drebert, the local agent, consented by parol to the additional insurance before it was written, and was notified afterwards that it had been written, was insufficient to bind the defendant without showing that such facts were brought to the knowledge of the company. It follows, from the views already expressed, that instructions 7, 8, and 9, given by the court on its own motion, should not have been given.

It is believed that the second paragraph of the reply, though not a model pleading, alleges sufficient facts to avoid the defense stated in the answer. The substance of that part of the reply is, that prior to the taking out of the additional insurance the defendant had notice thereof and consented thereto, with a full knowledge of all the facts. The language used does not suggest that the local agent gave such consent. The fair construction of the allegation is, that the proper officer or agent of the defendant was notified. The evidence, however, fails to sustain the allegation. The other averments of the reply, as to what was said by Drebert after the additional insurance was written, do not state sufficient facts to constitute a waiver of the conditions of the policy.

It is urged that the reply states facts inconsistent with the

averments of the petition. The answer pleaded a breach on the part of the plaintiffs of certain stipulations contained in the policy. The reply alleged matters showing a waiver of these conditions by the company. The plaintiffs' pleadings are consistent.

The plaintiffs, upon the trial, introduced testimony to show that the value of the property insured at the time of the fire was at least three thousand dollars. To show that the value at the time was not so large, the defendant put in evidence the proofs of loss made by the plaintiffs to the Orient Insurance Company, in which they placed the total value of the property insured at the time of the fire at \$1,564.78.

The court, in the thirteenth paragraph of the charge, instructed the jury that "the measure of damages is the fair market value of the goods destroyed at the time and place of the fire." This is the correct rule where the loss equals or exceeds the total amount of insurance upon the property destroyed. The insurance on the property in all three of the companies amounted to two thousand four hundred dollars. The policy in suit provides that "in case of any other policies, whether made prior or subsequent to the date of this policy, the insured shall be entitled to recover of this company no greater proportion of the loss sustained than the sum hereby bears to the whole amount of the policies thereon." Under the evidence, the jury could have found that the total value of the property destroyed was only \$1,564.78, which was much less than the entire insurance. The jury should therefore have been instructed that if they found that the loss was less than the whole insurance, the plaintiffs were not entitled to recover a greater part of the loss than the sum covered by the policy in suit bears to the total amount of insurance.

A point was made on the trial in the lower court that the plaintiffs were not the owners of the policy at the commencement of the suit. On the question of the assignment of the policy the evidence was conflicting. The instructions given at the defendant's request fairly submitted this branch of the case to the jury.

The other errors complained of are either disposed of by the views herein stated, or are such as will not be likely to arise on a new trial of the case, and therefore will not be noticed in this opinion.

The judgment of the district court is reversed, and the case remanded for further proceedings.

**INSURANCE — LIMITATION ON POWER OF AGENT.** — An insurance company may limit the power of its agent, and when restrictions are brought to the notice of the assured, and he relies on any act in excess of such limited power, he does so at his peril: *Weidert v. State Ins. Co.*, 19 Or. 261; 20 Am. St. Rep. 809, and note; *Cleaver v. Traders' Ins. Co.*, 65 Mich. 527; 8 Am. St. Rep. 908, and note; *Wilkins v. State Ins. Co.*, 43 Minn. 177.

**INSURANCE — WAIVER OF CONDITION BY AGENT.** — If an agent has authority only to solicit insurance and issue the policy, with no authority to change or waive any of its conditions, waiver by him is void, and it will be presumed that the assured had knowledge of the terms of the policy: *Burlington Ins. Co. v. Gibbons*, 43 Kan. 15; 19 Am. St. Rep. 118, and note; *East Tex. Ins. Co. v. Blum*, 76 Tex. 653. There are, however, cases affirming that an insurance agent authorized to take risks and issue policies has authority to waive by parol a condition in a policy issued by him: *Grubbs v. North Carolina Ins. Co.*, 106 N. C. 472; 23 Am. St. Rep. 62, and note.

## FRANS v. YOUNG.

[30 NEBRASKA, 380.]

**SCHOOL DISTRICT — MUNICIPAL CORPORATIONS.** — An organized school district, with power to sue and be sued, is merely a quasi corporation created for educational purposes, and is not, strictly speaking, a municipal corporation.

**OFFICERS OF SCHOOL DISTRICT — OATH OF OFFICE.** — School district officers are not municipal officers, and therefore are not required to take an oath of office, in the absence of express provision of law to that effect.

**SCHOOL OFFICERS — ACCEPTANCE OF OFFICE — OFFICER DE JURE — VACANCY.** — A person elected to an office in a school district, who, failing to file his written acceptance thereof, as required by law, immediately enters upon the discharge of the duties of his office, and performs all such duties required of him by law for more than a year without objection, thereby becomes an officer *de jure*, and no vacancy exists on account of his failure to file his acceptance.

*Beeson and Root*, for the plaintiff in error.

*B. S. Ramsey and Polk Brothers*, for the defendant in error.

**NORVAL, J.** On the eighteenth day of September, 1889, the county attorney of Cass County having consented thereto, the relator filed in the district court of said county an information, in the nature of a *quo warranto*, to try the right of the respondent to the office of moderator of school district No. 6 of Cass County.

It is alleged in the petition, that on the fourth day of April, 1887, the relator possessed all the qualifications required by law to entitle him to hold the office of moderator for said school district; that at the annual school election, held on

said day in said school district, the relator was elected to the office of moderator for said school district for the term of three years from said date; that immediately thereafter he entered upon the discharge of the duties of said office as moderator, and continued to discharge the duties thereof, by presiding at school district meetings of said district, countersigning warrants and orders on the county and school district treasurers for moneys belonging to said district, and performing all and singular the duties imposed by law on moderators of school districts; that the relator continued to discharge the duties of moderator of said district for the period of two years, and has one year of his said term of office to serve from and after the second Monday of July, 1889, and that he has not removed from said district, nor has he resigned said office of moderator.

The petition further alleges that the respondent, Benjamin F. Frans, on or about the second Monday of July, 1889, and from thence continually hitherto, without any legal warrant, claim, or right, has used and exercised, and still does unlawfully use and exercise, and pretends to discharge, the duties of the office of moderator in said school district No. 6 for the aforesaid term of office of the relator, and claims to be the moderator of said district in place of the relator. The relator prays judgment that the respondent be ousted from said office, and that the relator be declared entitled to the same.

For answer to the petition, the respondent "denies that the relator was elected to the office of moderator of said school district in the year 1887; but alleges the truth to be that at the annual meeting of said district, in April, A. D. 1888, the relator was elected to the office of moderator of said district, but that he failed to qualify or to file his written acceptance of said office in the time required, or at any other time; and so respondent charges that relator never was moderator *de jure* of said district, but that he assumed to act and did act as moderator of said district from said meeting in April until the regular annual meeting of said district in June, 1889, at which time the respondent was duly elected to the office of moderator of said district for two years, and that he duly qualified as such moderator and entered upon the discharge of the duties of said office, and that he now holds such office by virtue of such election and qualification."

A general demurrer was filed to the answer, which was sustained, and a judgment of ouster was entered against the respondent. That decision is assigned for error.

It is insisted by the respondent that the relator was not an officer *de jure*, because he never took the usual oath of office, and failed to file with the director of the school district his written acceptance of the office of moderator.

It is conceded by the respondent that the school law contains no provision requiring a person elected to the office of moderator of a school district to take an oath of office. But it is claimed that section 1 of chapter 10 of the Compiled Statutes requires school district officers to take the usual oath of office. That section provides that "all state, district, county, precinct, township, municipal, and especially appointed officers, except those mentioned in section 1, article 14, of the constitution, shall, before entering upon their respective duties, take and subscribe the following oath, which will be indorsed upon their respective bonds," etc. The word "district," as used in this section, refers solely to judicial district officers, and unless school district officers are municipal officers, it is apparent that they are not controlled by the provisions of said section. While the law makes every organized school district in this state a body corporate with power to sue and be sued, yet they are merely *quasi* corporations, created for the purpose of education, and are not, strictly speaking, municipal corporations. The officers of all incorporated villages, towns, and cities are municipal officers, and it is to these officers that the word "municipal" refers: 1 Dillon on Municipal Corporations, sec. 10; *Beach v. Leahy*, 11 Kan. 23. We are clearly of the opinion that school district officers are not required to take an oath of office.

Did the failure of the relator to file his written acceptance of the office within ten days create a vacancy in the office? Section 3 of subdivision 3 of the school law reads as follows: "Within ten days after the election, these several officers shall file with the director a written acceptance of the office to which they shall have been respectively elected, which shall be recorded by said director." The section contains no provision that the office shall become vacant if the acceptance is not filed. In this respect it differs from section 5 of subdivision 14 of the same act, relating to the qualification of the members of the board of education in cities. Said section 5 provides that the failure to take and subscribe the usual oath of office creates a vacancy. Section 15 of chapter 10 of the Compiled Statutes declares that if any person elected to office shall fail to execute and file his bond within the time fixed



by law, his office thereupon *ipso facto* becomes vacant. It is evident that it was not the intention of the legislature that the failure of a school district officer to file his acceptance should create a vacancy.

The object and purpose of the law requiring school district officers to file written acceptance was to apprise the public that the person elected intended to discharge the duties of the office. The pleadings show that the relator, immediately after his election, entered upon the performance of the duties of moderator, by presiding at school district meetings, counter-signing orders on the county and school district treasurer for moneys belonging to his district, and discharging all other duties required of him by law for more than one year, without objection from any one. This was as much an acceptance of the trust as would have been the filing of a written acceptance. The relator therefore was a *de jure* officer, and no vacancy existed at the time the respondent was elected. The judgment of the district court was right, and is affirmed.

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CORPORATIONS. — School districts are quasi corporations: *Gashill v. Dudley*, 6 Met. 546; 39 Am. Dec. 750, and note; *Andrews v. Bates*, 11 Me. 267; 28 Am. Dec. 521, and note.

OFFICERS DE JURE — WHO ARE. — Persons elected to office who have failed to qualify, or to assume the functions of the office, are in no sense officers *de jure*: *State v. Beloit*, 21 Wis. 280; 91 Am. Dec. 474. An officer *de jure* is one who is in all respects legally appointed and qualified to exercise the office: *Plymouth v. Painter*, 17 Conn. 585; 44 Am. Dec. 574.

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## LINDSAY v. CITY OF OMAHA.

[30 NEBRASKA, 512.]

MUNICIPAL CORPORATIONS — VACATION OF STREET — SALE OF VACATED LAND. — A city, possessing the absolute title to its streets and the power to vacate them, may, upon regularly vacating a street for the public good, and after a tender of fair damages to the abutting owners, grant or sell the land thus vacated to private parties. The title thereto does not revert to the abutting owners.

MUNICIPAL CORPORATIONS — VACATION OF STREET — DAMAGES — PRESUMPTION. — Where a city, possessing the power, vacates one of its streets, the abutting owners are entitled to damages for the injury sustained thereby; and if one of them sustains special injury in excess of that suffered by the community at large, he is entitled to damages therefor; but it will be presumed, in the absence of evidence to the contrary, that the damages tendered by the city are adequate for that purpose.

*William E. Healey and M. S. Lindsay*, for the appellant.

*John L. Webster*, for the appellee.

**COBB, C. J.** The appellant alleges that on June 25, 1885, he was the owner in fee of lots 1 and 2 of block 11, of McCormick's addition to the city of Omaha; that on February 8, 1887, the appellee, without legal authority, vacated the public street No. 29, in said addition, between blocks 9, 10, 11, and 12, and offered the same for sale; to enjoin which the appellant brought this suit in the district court of Douglas County against the city of Omaha, which upon final hearing and trial was dissolved, and the petition dismissed.

The answer of the defendant sets up that on February 8, 1887, the mayor and council duly passed an ordinance declaring that part of Twenty-ninth Street between Farnam and Howard Streets, in McCormick's Addition, vacated; that prior thereto three disinterested freeholders of the city were duly appointed to assess the damages to the respective property holders abutting and adjacent to the street so vacated, and such appraisers duly assessed such damages, and the respective amounts were duly tendered to the respective property holders so damaged; that prior to vacating said part of said street, defendant extended Twenty-ninth Avenue in a straight line from Howard to Farnam Street, and through said McCormick's Addition, and as so extended lies a short distance west of the property in the plaintiff's petition described, and is one of the main thoroughfares of the city, and that the extension furnished a safe and convenient way of travel for the plaintiff, and for the public, in place of that part of the street vacated, and as a substitute therefor; that prior to the vacation thereof, defendant duly extended Twenty-eighth Street in a straight line from Howard Street to Farnam Street through said addition, which extension lies a short distance east of the property of the plaintiff described, and is one of the main thoroughfares of the city, and that the extension furnished a safe and convenient way of travel for the plaintiff and for the public, in place of that part of Twenty-ninth Street vacated, and as a substitute therefor; that the vacating of said part of Twenty-ninth Street and the extending of Twenty-ninth Avenue and said Twenty-eighth Street were acts for the use and benefit of the plaintiff, and were for the public good.

The plaintiff's reply denies the allegations of the answer.

The cause was submitted to the court on the pleadings and evidence. The court found for the defendant, dismissing the petition, from which the plaintiff appealed to this court.

Sections 104 and 105 of chapter 14 of the Compiled Statutes

provide for the laying out of cities, villages, and additions thereto, into lots, streets, alleys, and squares, by the owners or proprietors of land, the platting of the same, and the acknowledging and recording of the plats thereof; and section 106 provides that "the acknowledgment and recording of such plat is equivalent to a deed in fee-simple of such portion of the premises platted as is on such plat set apart for streets or other public use, or as is thereon dedicated to charitable, religious, or educational purposes."

Some years ago, in writing the opinion in the case of *Omaha etc. R. R. Co. v. Rogers*, 16 Neb. 117, I made a thorough examination of the adjudicated cases of the states having statutory provisions similar, or nearly so, to our own above cited, and came to the conclusion that the fee-simple title to the streets of cities or villages, which passes by virtue of the acknowledgment and recording of the plats, passes to and vests in the city or village.

Section 56 of chapter 12 a of the Compiled Statutes provides as follows: "The mayor and council shall have power . . . to provide for the opening, vacating, widening, and narrowing of streets, avenues, and alleys within the city, under such restrictions and regulations as may be provided by law." This provision relates to cities of the metropolitan class, but there is also a similar provision relating to cities of the first class.

The provision of statute first above quoted is identical with that of a statute of Iowa. That state also has a provision of statute nearly identical with that last above cited. Under these statutes questions nearly similar to the one at bar have been several times before the supreme court of that state. The case of *Dempsey v. City of Burlington*, 66 Iowa, 688, I am unable to distinguish in principle from the case at bar. It is true, the case appears to have been contested, not so much upon the want of power on the part of the city to vacate the alley in question and convey the land thus vacated, as the form in which it was sought to be done. Yet the court squarely decided the question of power to grant the vacated ground to a private person, as well as to vacate the alley.

The case of *Marshalltown v. Forney*, 61 Iowa, 578, involves the same principle as the above, and was decided the same way. While I am inclined to follow these cases as far as is necessary to a decision of the case at bar, yet, in so far as it was the purpose and object of the city authorities of Des Moines and Marshalltown, respectively, in vacating the alley involved,

to enable themselves to grant away the vacated ground, I would not follow them, as I think that the sale or granting of such ground by the city could only be done as an incident to the power to open and vacate.

In the case of *Williams v. Cary*, 78 Iowa, 194, the court in the opinion says, after speaking of the several cases above cited, and others: "While in none of the cases heretofore determined by this court are the facts similar to those in the case at bar, yet the power of the city, in a proper case, to vacate a street has been several times affirmed. Such power is clearly conferred by statute. Under it the power to narrow, widen, or vacate a street is practically unlimited, when it is exercised for the public good, and yet it cannot be arbitrarily exercised under the pretense that the public good requires it. While this is true, it is subject to equitable control, and therefore, to a large extent, each case must be determined in accordance with its own particular facts. An abutting lot-owner cannot arbitrarily object to the vacation of a street, or a part of a street, nor can he, upon slight grounds, prevent the accomplishment of that which is a material benefit to the general public; and the conclusion of the city council will, ordinarily at least, be conclusive as to the question whether the vacation of a particular street is for the public good. This being so, the question is, whether the plaintiffs will be materially damaged. That they will be damaged to some extent will be conceded; but no tangible property belonging to them will be taken or appropriated for the public benefit. In a city or other community, at least some rights of an individual must be subordinate to the general good."

In the case at bar the action is an equitable one, and the remedy sought is a perpetual injunction to prevent a sale of the vacated ground by the city, or its interference with the plaintiff in his enjoyment of the same as an open street. Plaintiff does not question the method by which the city has sought to vacate the street, or to sell the ground, but attacks its power to do either, and proceeds upon the theory that it not having the power to vacate the street remains open, notwithstanding the vacating ordinance and the assessment and tender of damages to the abutting property holders. The question, as presented by the pleadings, admissions, and evidence, is, I think, fully answered by the statute which confers upon the city the power to vacate streets.

Doubtless residence property in a city may be, and often is,

so situated in respect to other streets that to vacate a certain street immediately fronting thereon would inflict an irreparable injury, and as such might be enjoined. But such case is not presented here. At the same time, it must be conceded that the vacation of Twenty-ninth Street, as the parties call it, or Twenty-eighth Street, as it is marked on the exhibit, would be an especial damage to the property of the plaintiff, not shared in by the property of the city, or of McCormick's Addition generally. The city concedes this by providing for the appraisement and tender of such damages, and the appraisement of the damages sustained by some fair and adequate method, and its payment by the city to the plaintiff is doubtless the relief to which the plaintiff was entitled. This relief he was entitled to upon the vacating of the street, which right is inconsistent with any on his part that the title to half of the street reverted to him upon its vacation, as well as any right to use the vacated ground as a street. So that it all depends upon the right of the city to vacate the street, a right given by the letter of the statute; and I know of no reason through which it should not be made continuous and effective.

The judgment of the district court is affirmed.

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**HIGHWAYS — VACATING STREETS.** — The legislature may authorize municipal corporations to vacate or discontinue streets or highways: *Meyer v. Teutopolis*, 131 Ill. 552. The city, in vacating a street, must act in the way prescribed by statute: *Müller v. Corinna*, 42 Minn. 391. If a street is vacated, the adjoining proprietors in whom the fee of the street is vested have a right to use the land it had occupied as their own, the party on either side not extending his dominion beyond the center of the street: *Paul v. Carver*, 24 Pa. St. 207; 64 Am. Dec. 649, and note.

**HIGHWAYS — DAMAGES FOR VACATING STREET.** — A person through whose land an established highway is sought to be vacated is entitled to receive such damages as he may sustain by the vacation: *Cook v. Quick*, 127 Ind. 477; *Pearson v. Eaton County*, 74 Mich. 558.

## STATE v. SCHOOL DISTRICT.

[80 NEBRASKA, 520.]

**MUNICIPAL CORPORATIONS.** — THE STATUTE OF LIMITATIONS runs for and against cities, towns, and school districts, as well as for and against individuals.

**MANDAMUS — STATUTE OF LIMITATIONS AGAINST.** — A proceeding by *mandamus* is an action at law, and may be barred by the statute of limitations.

**MANDAMUS — STATUTE OF LIMITATIONS AGAINST.** — A proceeding by *mandamus* to compel public officers to perform a public duty is within the operation of a statute of limitations which applies to all claims that may be made the ground of an action at law, in whatever form they may be presented, although such statute does not expressly include a proceeding by *mandamus*.

*Dawes and Foss*, for the relator.

*G. M. Lambertson*, for the respondents.

COBB, C. J. The Chemical National Bank of New York City, as relator, filed its petition August 31, 1888, for a peremptory writ of *mandamus* to compel the school board of district No. 9, of Sherman County, to report the indebtedness of said district, and the rate and amount of taxes required to pay the same, to the county clerk and the county commissioners, commanding them to levy a tax upon all the taxable property of the citizens of said district to pay such indebtedness, or to pay one third thereof the first year ensuing, and an equal amount annually until the whole be paid; and commanding the county treasurer to collect and retain the same in special fund, and as often as \$100 should be collected, to pay over the same to the clerk of the supreme court, to be by him paid to the relator, on account of two certain school district bonds, lawfully issued by said district and held by the relator, numbered 5 and 8 respectively, for \$500 each, dated July 1, 1874, payable in six years from date, with interest at ten per cent per annum, amounting in all to \$2,105, for the assessment, collection, and payment of which demand had been duly made, which demand has been neglected and refused by said district board and said county officers, and no part thereof has been paid, except such interest coupons as became due prior to January 1, 1879; which were paid.

The defendants appeared and demurred to the petition,—  
1. That it fails to state a cause of action; 2. That the cause of action is barred by the statute of limitations, or did not accrue within five years next preceding the filing of the petition.

The relator claims that the defendants admit, by demurrer, the facts set up in the petition; that district No. 9 is a duly organized school district; that it borrowed, by legal methods, the money represented by the bonds Nos. 5 and 8, used it for school purposes within and for the district, and paid the interest due prior to January 1, 1889.

It contends that the demurrer should be overruled, because "there is no doubtful question of the statute of limitations not running against this cause of action in any former decisions of this court, as claimed by defendants." That the distinction between a school district warrant for money due, and a school district bond negotiated for the loan of money, is plain and evident, and ought not to be subject to the operation of the statute of limitations, for the reason that the warrant can only be drawn upon funds already provided and remaining in the treasury, and the bonds are issued as the obligation of the district to pay that amount at a future day, on the public faith of the officers, and upon the presumption that they will do their duty in levying and collecting taxes in order to pay the bonds according to their legal purport. It contends that, under sections 645-648 of the Code, *mandamus* should always issue where the right to require performance of the act is clear, and where no other specific remedy is provided; and contends further, that it is an established doctrine in the construction of statutes of limitation that cases within the reason and not within the words of the statute, as in this instance, are not barred, but may be considered as omitted cases in the act, the legislature not deeming it proper to limit them.

In support of the application, the relator's counsel cites the decisions of the supreme courts in several states. In *Smith v. Lockwood*, 7 Wend. 241, it was held, in the state of New York, in the year 1831, "that the statute of limitation is not a bar to every action of debt, but only to those brought for arrearages of rent, or founded upon any contract without specialty; and that the settled construction of the statute is, that it applies solely to actions of debt founded upon contracts in fact, as distinguished from those arising from construction of law."

In *Bass v. Bass*, 6 Pick. 362, it was held in Massachusetts, in 1828, in an action between merchants, on an account for goods sold and delivered, that although in a case in New York (*Coster v. Murray*, 5 Johns. Ch. 522), Chancellor Kent had reviewed the authorities, and had come to the conclusion that merchants' accounts are within the statute where there is no



item within six years, yet in a case reported (*Mandeville v. Wilson*, 5 Cranch, 15), the court maintained the contrary doctrine; and as the language of the Massachusetts statute is clear, the court will ground its decision upon it. The words of the statute are: "All actions of account and upon the case, other than such accounts as concern the trade of merchandise between merchants, their factors or servants, shall be commenced within the time limited. Such accounts are not within the statute. This is the most natural construction, and the only one the words of the statute will allow."

In *Jordan v. Robinson*, 15 Me. 167, the suit was an action of debt on a judgment of the supreme court of New Brunswick, British Province, rendered in 1818, to which was pleaded the general issue and the statute of limitations. The court held "that the obligation is not a debt grounded upon any lending or contract within the meaning of the statute; but looking to the consideration of the judgment, we find it founded upon an express contract, but one excepted from the operation of the statute, being rendered upon a note in writing for the payment of money, attested by a witness." Judgment was for the plaintiff, in the year 1838.

In *Keith v. Estill*, 9 Port. 669, the action was brought on a judgment of the county court of Franklin County, Tennessee, rendered in 1820. The statute of limitations was pleaded, the plaintiff demurred, and the court overruled the demurrer. The supreme court, in 1840, Ormond, J., said: "I should be willing to rest the decision on the construction of our statute, that the framers of the act by the word 'contract' did not contemplate judgments, and that it is a *casus omissus*. The contrary opinion has only been supported on the ground that a foreign judgment is merely *prima facie* evidence of a debt; but the judgments of our co-states, rendered on service of process, are conclusive evidence of the debt when sought to be enforced in any other state." From this opinion Goldthwaite, one of the justices, dissented, and said, in his judgment, the plea interposed was a complete bar to the action.

In *Bedell v. Janney*, 4 Gilm. 193, the supreme court of Illinois, in the year 1847, held that it was then a well-established doctrine that cases within the reason, but not within the words, of the statute of limitation are not barred, but may be considered as omitted cases which the legislature had not deemed proper to limit."

In the case of *Garland v. Scott*, 15 La. Ann. 143, it was held

by the supreme court of that state, in 1860, that "statutes of prescription and limitation could not be extended from one action to another, nor to analogous cases, beyond the strict letter of the law."

It will not be disputed that anciently, from 1550 to 1800, and subsequently, the views and arguments offered by the relator's counsel in this case, and the precedents cited by him, in their own day, were the accepted rule and authority as to the significance and force of the writ of *mandamus*. But those days are past, and the economy of the law has enlarged the rule. It has been extended in this instance, as in many other remedies, and *mandamus*, from a prerogative writ of the crown or the state to enforce an official duty, has modernly come to be an action at law involving all the merits of the inquiry. Hence demurrer is entertained to the relator's information.

The important question raised by the demurrer is that of the statute of limitations applicable to the cause of action described by the relator.

It was given out from this court, as early as 1870, in the case of *Brewer v. Otoe County*, 1 Neb. 382, that "the section of the Code of Civil Procedure providing that 'an action upon a specialty, or any agreement, contract, or promise in writing, or foreign judgment, can only be brought within five years after the cause of action shall have accrued,' applies as well to actions where counties or other municipal corporations are parties as between private persons, the law recognizing no distinction in suitors, but applying the same rule to all." The relator's cause of action would seem to be within this rule under four of the conditions mentioned.

In the case of *May v. School District*, 22 Neb. 205, 3 Am. St. Rep. 266, this rule was maintained. The plaintiff sued on a warrant for seventy-five dollars, dated September 9, 1879, payable eighteen months after date. More than five years had elapsed after the maturity of the warrant before suit was commenced. The statute of limitations was applied, and it was held that "the maxim, Lapse of time is no bar to the rights of the sovereign, applies only to a sovereign state, and not to municipal corporations deriving their powers from the state, although their powers, in a limited sense, are governmental; and thus it appears that the statute runs for and against cities, towns, and school districts in the same manner that it does for and against individuals."

Arguments need not be prolonged in support of this propo-

sition. It has been considered and settled: *City of Cincinnati v. Evans*, 5 Ohio St. 594; *City of Cincinnati v. First Presb. Church*, 8 Ohio, 298; 32 Am. Dec. 718; *Lane v. Kennedy*, 18 Ohio St. 42; *School Directors v. Goerges*, 50 Mo. 194; *Kennebunkport v. Smith*, 22 Me. 445; *Clements v. Anderson*, 46 Miss. 581; *Evans v. Erie County*, 66 Pa. St. 225; *St. Charles County v. Powell*, 22 Mo. 525; 66 Am. Dec. 637; *Callaway County v. Nolley*, 31 Mo. 393; *Abernathy v. Dennis*, 49 Mo. 469; *Pimental v. San Francisco*, 21 Cal. 351; *Clark v. Iowa City*, 20 Wall. 588; *De Cordova v. Galveston*, 4 Tex. 470; *Underhill v. Trustees etc.*, 17 Cal. 172; *Baker v. Johnson Co.*, 38 Iowa, 151; 2 Dillon on Municipal Corporations. sec. 668.

The question of the statute of limitations to be applied to municipal corporations was again considered in this court, in July, 1888, in the case of the *Village of Arapahoe v. Albes*, 24 Neb. 242, 8 Am. St. Rep. 202, and it was held that "the statute will run against a warrant issued by the proper authorities of a village, and the warrant will be barred in five years from the time it becomes due"; citing the decision in the case of *Brewer v. Otoe County*, 1 Neb. 382.

And again, in the case of *School District v. First National Bank*, 19 Neb. 89, the district bonds of the plaintiff in error, the cause of action sued upon, were signed by the moderator, director, and treasurer of the school district, dated October 16, 1873, registered the 23d following, and issued by the district after the latter date. To one of the bonds for two hundred dollars, due October 1, 1875, there was pleaded the statute of limitations, the action having been commenced July 26, 1882, and there being evidence and indorsements on the bond of the payment by the county treasurer of interest thereon, March 22, 1878, \$25; April 30, 1878, \$60.25; June 15, 1878, \$54; it was held that such evidence was competent to take the bond out of the operation of the statute of limitations, which otherwise would have barred the action.

If it be insisted that limitation is not to be applied to *mandamus* as to the duties of municipal officers, it is answered that section 2 of title 1 of the form of civil actions of the Code of Civil Procedure declares that "the distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished, and in their place there shall be hereafter but one form of action, which shall be called a civil action," the complainant to be

known as the plaintiff, and the adversary as the defendant in the case.

In consonance with this provision, it was held in the case of *State v. Lancaster Co.*, 18 Neb. 223, that "a *mandamus*, under our practice, is an action at law, and is reviewable only on error, and not by appeal." This decision would appear to settle all the important questions contended for by the counsel for the relator, against his expressed views. Nor is the decision inconsistent with the modern rule of *mandamus* in this country.

In the case of *Commonwealth v. Dennison*, 24 How. 66, as early as 1860, the chief justice of the United States, after remarking that "the court is sensible of the importance of this case, and of the great interest and gravity of the questions involved in it which have been raised and fully argued at the bar," held "that a writ of *mandamus* does not issue in virtue of any prerogative power, and in modern practice is nothing more than an ordinary action at law in cases where it is the appropriate remedy." This application was for a writ of *mandamus* to compel the defendant to deliver up to the custody of the plaintiff the body and person of one Willis Sago, indicted of the offense of seducing and enticing Charlotte, a slave of C. W. Nuckols, to leave her master and escape into Ohio. The cause of action was fully inquired into, and the writ denied: *Kendall v. United States*, 12 Pet. 615.

This new view, if it may be called so, has been so well settled, and so apparently proper, that our brother Maxwell in his work has adopted it, and said that "in modern practice *mandamus* is nothing more than an action at law between the parties": Maxwell's Pleading and Practice, 729. And while this principle cannot be misunderstood in this state, it does not seem to be less common to others. In the case of *Dement v. Rokker*, 126 Ill. 189, it was held "that *mandamus* was an action at law, to be governed by the same rules of pleading as in other actions, and was within the limitation act which provided that 'all actions founded upon any judgment shall be commenced within sixteen years after the cause of action accrued, and not thereafter.'" The supreme court of Illinois held, further, that the defense of this statute was good, and said that "obviously this proceeding was comprehended within the term 'action' used in the statute": *Peoria County v. Gordon*, 82 Ill. 437.

Mr. J. L. High, in his important work on extraordinary

remedies, sec. 355, lays it down, that in cases where the aid of *mandamus* is sought to compel public officers to draw their warrant for the payment of money, "the right to relief, in this class of cases, may be barred by the statute of limitations." That we believe to be this case, and we hold broadly that our statute of limitations, although confined in terms, applies to all claims that may be made the ground of action at law, in whatever form they may be presented; the same falling within the meaning and purport of section 16 of the code when not falling within any other.

It does not seem doubtful, from the precedents and authorities cited, that the demurrer in this case is well taken, and that the statute of limitations is a bar to the writ, which is denied, at the costs of the relator.

Writ denied.

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**MUNICIPAL CORPORATIONS — STATUTE OF LIMITATIONS.** — The statute of limitations runs in favor of villages and cities: *Arapahoe v. Albee*, 24 Neb. 242; 8 Am. St. Rep. 202, and note, in which cases are collected; *Deals County v. Jones*, 51 Ark. 524; *Fosworthy v. City of Hastings*, 23 Neb. 772. The statute also runs against municipal corporations: *Western Lunatic Asylum v. Miller*, 29 W. Va. 326; 6 Am. St. Rep. 644, and note; *City of Muscatine v. Chicago etc. R'y Co.*, 79 Iowa, 645; *Cincinnati v. First Presbyterian Church*, 8 Ohio, 298; 32 Am. Dec. 718, and extended note.

**MANDAMUS — STATUTE OF LIMITATIONS.** — A delay for more than six years to demand payment of township warrants, or to apply for *mandamus* to compel such payment, will, if unexplained, bar such relief: *Avery v. Township of Krakow*, 73 Mich. 622. The statute of limitations applies to all actions, whether at law or in equity: *Hargis v. Sewell*, 87 Ky. 63.

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## ROBERTS v. MOUDY.

[30 NEBRASKA, 632.]

**EXEMPTIONS — HEAD OF FAMILY — DIVORCED HUSBAND.** — Where husband and wife are divorced, and the custody of their minor children is given to her, but he continues to furnish means for the support of such children, he is the head of a family, and entitled to the benefit of the exemption laws.

**EXEMPTIONS.** — **LIBRARY AND IMPLEMENTS OF A PROFESSIONAL MAN** are exempt from execution, whether he is the head of a family or not.

*E. V. Clark, and Sullivan and Reeder*, for the plaintiff in error.

*W. F. Critchfield and M. V. Moudy*, for the defendant in error.

MAXWELL, J. On September 14, 1886, the plaintiff in error

was the sheriff of Nance County, and had for collection an execution issued out of the district court of Buffalo County against M. V. Moudy, the defendant in error. Moudy was a practicing lawyer of Nance County, and the execution was levied upon his law library and other property used by him in the practice of his profession. Moudy gave a redelivery bond to the sheriff and retained possession of the property levied upon.

In April, 1887, the plaintiff in error sought to sell the property upon which the levy had previously been made, when Moudy alleged that he was the head of a family, and filed an inventory of his assets with the sheriff, who refused to recognize his right to the benefit of the exemption law. Moudy thereupon commenced an action to enjoin the sale, and also one to cause the sheriff to appraise and set aside the property as exempt. Both actions were commenced March 30, 1888, and were, on the motion of defendant in error, subsequently consolidated. A temporary injunction was granted, which, on final hearing, was made perpetual, and at the same time a peremptory writ of *mandamus* was awarded against Roberts, and the property appraised and awarded to Moudy.

The testimony tends to show that in the year 1875 Moudy was married in Wyoming Territory; that two children were the fruit of this marriage. In the year 1878 or 1879 his wife returned to her father's home in Wyoming, taking the children with her, and in 1880 she procured a divorce from her husband, and in the decree was awarded the custody of the children. Moudy testifies, however, that he has continued to furnish means for the support of his children. There is no denial of this testimony in the record, except such as may be inferred from the decree of divorce. There is testimony, therefore, tending to show that he is the head of a family, and entitled to exemption under the statute.

Under section 530 of the code, "the library and implements of any professional man" are exempt, whether he is the head of a family or not.

Nearly all the property levied upon in this case was such as pertained to Moudy's law office, and was exempt under the statute.

The judgment of the court below is right, and is affirmed.

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EXEMPTIONS. — Who is head of family within the meaning of the exemption laws, see note to *Seaton v. Marshall*, 99 Am. Dec. 684; extended note to *Wade v. Jones*, 61 Am. Dec. 586-593, in which the subject is fully discussed.

**EXEMPTIONS — LIBRARY AND TOOLS OF PROFESSIONAL MAN.** — The office furniture of a lawyer is exempt from execution, under a statute which exempts the proper tools and implements of a professional man: *Abraham v. Davenport*, 78 Iowa, 111; 5 Am. St. Rep. 665. The tools of a dentist are exempt from execution: *Mason v. Perrett*, 17 Mich. 332; 97 Am. Dec. 191, and note; extended note to *Kilburn v. Denning*, 21 Am. Dec. 545-554.

## BURR v. LAMASTER.

[30 NEBRASKA, 602.]

**DEEDS. — AN ENCUMBRANCE IS ANY RIGHT TO OR INTEREST IN LAND** which may subsist in third persons, to the diminution of the value of the land, and not inconsistent with the passing of the fee in it by deed.

**DEEDS — ENCUMBRANCE — PARTY-WALL AGREEMENT.** — A covenant by the owner of a lot to pay a portion of the cost of a party-wall erected thereon, in the event that it is used by him, is a covenant and encumbrance which runs with the land, and is binding upon his grantee. It therefore constitutes a breach of the covenants in his deed against encumbrances.

**DEEDS. — COVENANT AGAINST ENCUMBRANCES** in a deed covers those unknown as well as those known to the grantee at the time of his purchase.

*Pound and Burr*, for the plaintiffs in error.

*O. P. Mason*, for the defendant in error.

**NORVAL, J.** On the eighth day of May, 1886, the defendant, Milton F. Lamaster, was the owner of lots 7 and 8, in block 40, in the city of Lincoln, and E. W. Baldwin and G. S. Baldwin were the owners of lot 9, in said block. On said day the said Lamaster and the Baldwins entered into the following contract for a party-wall between said lots 8 and 9: —

“Articles of agreement made and concluded this eighth day of May, 1886, by and between E. W. Baldwin and G. S. Baldwin, party of the first part, and Milton F. Lamaster party of the second part, witnesseth: —

“That whereas said parties of the first part are the owners of lot 9, block 40, in the city of Lincoln, in the county of Lancaster, and state of Nebraska; and whereas said party of the second part is the owner of lot 8, block 40, in the said city of Lincoln, which lot joins said lot 9, belonging to said first parties, on the west side; and

“Whereas said first parties contemplate building upon their said lot 9 a three-story brick store-building, and one wall of which would lie along the west of said lot, adjacent to said lot 8, belonging to the party of the second part, —

“Now, therefore, it is hereby mutually covenanted and



agreed, by and between the parties hereunto, that said first parties shall build said wall so that the center of the same shall be upon the dividing line between said lots 8 and 9, in said block 40, in the city of Lincoln, Lancaster County, Nebraska, and that the same shall be and remain a party-wall for the common use of the parties hereunto.

“And it is further agreed that said parties shall construct said wall in a good, durable, and sufficient manner, the wall of basement being one foot ten inches in thickness, with a footing of concrete one foot thick by three feet wide, and a footing of large stone upon this; that the wall of the first story shall be four bricks or sixteen inches in thickness, and that the remainder of wall shall be three bricks or thirteen inches in thickness; that said wall shall contain flues properly built and arranged for the accommodation and use of the party of the second part; that there shall be at the height of each story proper joist holes left in said wall, and in the west side thereof, for the accommodation of the party of the second part, and that said holes shall be filled with brick set on end, so they can be taken out when required, and that said holes shall be made directly opposite to the ends of the joists of said building to be erected by the parties of the first part. It is also further agreed that in case said first parties do not build on the whole of said lot 9, and that their wall does not extend to the full depth of lot 9, and that their wall does not extend to the full depth of said lot, and if at any time either of the parties hereunto desires to extend said party-wall, they shall be at liberty to do the same, subject to all the terms and conditions of this contract as to thickness and character of wall, and as to the rights and privileges of both parties hereunto.

“It is also mutually agreed that when the party of the second part shall join to or make use of said party-wall he shall pay to first parties for the same a sum not exceeding the first cost thereof, or the portion thereof so used, to be determined at that time by two disinterested persons or arbitrators, one to be chosen by the party of the first part and one by the party of the second part, and in case of disagreement these two arbitrators shall choose a third person as referee, and the decision of these three persons as to the value of said wall shall be final.

“And in case of the extension of said party-wall by either of the parties hereunto, then the other party shall, upon his joining to or using said wall, pay to the party building the

same one half the value thereof, the same to be determined as hereinbefore provided.

"It is further agreed by and between the parties hereunto that the several covenants and agreements herein contained shall extend to and be binding upon their several heirs, executors, and administrators and assigns.

"In witness whereof, we have set our hands this seventh day of May, 1886.

"In presence of

"Party of the first part:

"G. S. BALDWIN.

"E. W. BALDWIN.

"Party of the second part:

"M. F. LAMASTER."

The above contract was duly acknowledged, and on the nineteenth day of May, 1886, was recorded in the county clerk's office of Lancaster County. During the year 1886 the Baldwins erected a brick building on lot 9, and in pursuance of the above agreement, constructed a party-wall on the line between lots 8 and 9, one half of the wall resting on each of said lots.

On February 19, 1887, Lamaster sold and conveyed to Carlos C. Burr and Lionel C. Burr said lots 7 and 8. The deed contains the following covenants:—

"The said Milton F. Lamaster does hereby covenant with said Carlos C. Burr and Lionel C. Burr, and their heirs and assigns, that he is lawfully seised of said premises; that they are free from encumbrance; that he has good right and lawful authority to sell the same; and said M. F. Lamaster does hereby covenant to warrant and defend the title to said premises against the lawful claims of all persons whomsoever."

Afterwards, the Burrs erected a six-story stone building on the lots purchased by them, but did not use said party-wall. The plaintiffs brought this suit for damages, claiming that the party-wall agreement and the party-wall constructed by the Baldwins constituted a breach of the covenants in the deed. The judgment of the district court was for the defendant.

The main question presented by the record is, whether the party-wall agreement and the party-wall erected in pursuance thereof constituted a breach of the covenants of the deed against encumbrances.

An encumbrance is defined to be any right to or interest in land which may subsist in third persons, to the diminution of the value of the land, and not inconsistent with the passing of

the fee in it by the deed of conveyance: 1 Bouv. Law Dict. 784; 2 Greenl. Ev., sec. 242; *Fritz v. Pusey*, 31 Minn. 368; *Prescott v. Trueman*, 4 Mass. 630; 3 Am. Dec. 246.

By the contract entered into between Lamaster and the Baldwins, the latter were authorized to construct one half of the party-wall on the vacant lot owned by Lamaster, and he covenanted for himself, his heirs and assigns, to pay the Baldwins the one half of the cost of the wall whenever he should make use of the same. This agreement gave the Baldwins an interest in the nature of an easement in the Lamaster lot, and constituted an encumbrance. The obligation to pay a portion of the cost of the wall was not merely a personal covenant binding upon Lamaster, but was a burden which ran with the land, and bound his grantees to pay for one half of the wall if they used the same. It was a charge upon the lot conveyed to the Burrs, and until it was used by them the Baldwins had a right of property in the wall.

In *Savage v. Mason*, 3 Cush. 500, the action was brought for a breach of covenants against encumbrances. In an agreement of partition of real estate between the owners, it was stipulated that the center of the party-walls of each brick or stone building might be placed upon the lines dividing the lots from a contiguous lot, and that the owner of such contiguous lot should pay for one half of the wall so used by him, whenever he should make use of the same. A lot set off to Benjamin Joy, one of the parties to the agreement, was conveyed by his heirs to John F. Loring and Henry Arews, and subsequently it was by them conveyed to Ezekiel W. Pike, who erected his brick dwelling-house on the lot, placing the center of one of the walls upon the line dividing his lot from the contiguous lot. Subsequently, Pike conveyed his lot to Luther S. Cushing and wife, who in turn conveyed to the plaintiffs. The contiguous lot by Jonathan Mason was, upon his death, set off to the defendant, who erected thereon a brick dwelling, in which the party-wall was used. The plaintiff sued upon the covenant for one half of the value of the party-wall. The court, in the opinion, says: "A covenant is said to run with the land when either the liability to perform it, or the right to take advantage of it, passes to the assignee of the land. The liability to perform and the right to take advantage of this covenant both pass to the heir or assignee of the land to which the covenant is attached. This covenant can, by no means, be considered as merely personal or

collateral, and detached from the land. There was a privity of estate between the covenanting parties in the land to which the covenant was annexed. The covenant is in terms between the parties and their respective heirs and assigns; it has direct and immediate reference to the land; it relates to the mode of occupying and enjoying the land; it is beneficial to the owner as owner, and to no other person; it is in truth inherent and attached to the land, and necessarily goes with the land into the hands of the heir or assignee." Among the many decisions sustaining the same proposition, we cite *Roche v. Ullman*, 104 Ill. 1; *Sharp v. Cheatham*, 88 Mo. 498; 57 Am. Rep. 433; *Richardson v. Tobey*, 121 Mass. 457; 23 Am. Rep. 283; *Bronson v. Coffin*, 108 Mass. 175; 11 Am. Rep. 335; *Platt v. Eggleston*, 20 Ohio St. 414.

In the case of *Sharp v. Cheatham*, 88 Mo. 498, 57 Am. Rep. 433, Roach and Stitt and Austin Elliott, being the owners respectively of adjoining lots in the town of Warrensburg, Missouri, on July 7, 1868, entered into a written agreement, by which Roach and Stitt agreed to erect a party-wall on the line between the two lots, and Elliott agreed that when he should use said wall, he would pay to the other parties one half of so much of the wall as he should join to. Subsequently, Roach and Stitt erected a wall along the line between the lots, and six inches on Elliott's lot for ninety feet in length. Afterwards, Elliott erected a building on his lot, using the party-wall. Subsequently, Roach and Stitt conveyed their lot to one Sharp, and shortly thereafter Elliott conveyed his lot to Cheatham, who erected thereon a brick extension of the building previously erected by Elliott, and joined the same with the party-wall, using thirty feet in length and sixteen feet in height. Suit was brought to recover from Cheatham the costs of one half of the wall used by him. It was held that the effect of such an agreement was to create cross-easements as to each owner, and that the one who purchased the lot with notice would be bound by his grantor's agreement to pay one half the cost of the party-wall upon using it.

The question was again before the same court in March, 1886, in the case of *Keating v. Korfhage*, 88 Mo. 524. It was a suit to enforce the provisions of a party-wall agreement similar to the one in the case at bar. We quote from the *syllabus* of that case: "An agreement made between adjoining owners in relation to a party-wall erected on the division line of their

lots is binding on the parties, and creates an equitable charge, easement, and servitude upon the lots built upon."

There are cases holding that a party-wall agreement like the one before us is merely personal, binding alone upon the parties to it, and does not attach to the land, but the weight of the decisions in this country is to the effect that it attaches to and is a charge upon the land.

A case similar in its facts to the one at bar is *Mackey v. Harmon*, 34 Minn. 168. One Hurlburt and the defendant Harmon, owning adjoining lots in Minneapolis, entered into a written agreement that Hurlburt might erect a party-wall on the dividing line between the lots, so that one half of the wall should stand on each lot, and that Harmon should have the right to join to and use the wall by paying one half of the value of so much thereof as he should use. The agreement was acknowledged and recorded. Hurlburt erected the party-wall according to the agreement, and afterwards Harmon conveyed his lot to the plaintiff Mackey by a deed containing covenants against encumbrances, and Mackey conveyed one half the lot to his co-plaintiff Legg, which deed contained like covenants. The plaintiffs, in order to use the wall, paid to Hurlburt \$850, being one half of the value of the wall used by them. Suit was brought against Harmon on his covenants against encumbrances. The trial court held that the party-wall agreement did not constitute a legal encumbrance. The case was reversed by the supreme court. Berry, J., in delivering the opinion of the court, says: "The easement in the plaintiff's lands in favor of and appurtenant to Hurlburt's is a right or interest in a third person in the former, to the diminution of its value, and therefore an encumbrance within the authoritative definition before given. The existence of the encumbrance does not depend upon the extent or amount of the diminution in value. If the right or interest of the third person is such that the owner of the servient estate has not so complete and absolute an ownership and property in his land as he would have if the right or interest spoken of did not exist, his land is in law diminished in value and encumbered. It follows that in the case at bar the existence of the right in plaintiff's land conferred upon and as appurtenant to Hurlburt's land was an encumbrance, and that therefore the covenant against encumbrances in Harmon's deed to plaintiff Mackey is broken."

The supreme court of Iowa, in *Bertram v. Curtis*, 81 Iowa, AM. ST. REP., VOL. XXVII. — 23

46, held that where the owner of a vacant lot, on which rests one half of a neighbor's wall, conveys the same with a covenant of warranty against encumbrances, the existence of such wall is not a breach of the covenant. This case is not an authority in point. An examination of the reported case shows that it is based upon a statute of that state which confers the right to one who is about to erect a building contiguous to the lot of another to construct one half of the wall on his neighbor's lot, and gives the latter the right to make use of the wall as a party-wall by paying one half of the expense of constructing the same. Under such a statute the existence of a party-wall would not be an encumbrance. The covenant is presumed to have been made with reference to the provisions of the statute. As we have no law in this state regulating party-walls, it is obvious that the decision in *Bertram v. Curtis*, 31 Iowa, 46, is not applicable.

In *Mohr v. Parmelee*, 43 N. Y. Super. Ct. 320, it was held that a party-wall resting upon the land of adjoining owners is not an encumbrance. In that case it appears that the party-wall was constructed wholly on one of the two adjoining lots, with the right granted to the owner of the other contiguous lot to use the same as a party-wall. It was held, both in the opinion and syllabus, that such right constituted an encumbrance upon the lot on which the wall stood. It is obvious that what is said by the court about a party-wall constructed upon the lots of adjacent owners not being an encumbrance is mere *obiter dicta*, and was not pertinent to any question necessary to be decided in the proper determination of the case.

In *Hendricks v. Starks*, 87 N. Y. 106, 93 Am. Dec. 549, it was held that "a party-wall creating a community of interest between adjoining proprietors is in no just sense to be deemed a legal encumbrance." That was an action to enforce the specific performance of a contract for the sale of real estate. Stark refused to complete his purchase, on the ground that two of the walls of the building on the premises were party-walls, which supported the buildings on adjoining lots. These walls stood part on the premises purchased and part on the adjoining lots. It is doubtless true that a party-wall between two buildings owned by different persons would not constitute a breach of a covenant against encumbrances, for the owners have a community of interest in the wall, each having the right to support his building by that part of the wall owned by the other. It is difficult to see how a purchaser of one of

the buildings and the lot on which it stands could be damaged by the existence of the party-wall, as the easement of support is mutual and reciprocal. But where one purchases a vacant lot which supports the half of the wall of the building erected on the adjoining lot, and such purchaser is, by the terms of a previous party-wall agreement, obliged to pay part of the costs of the wall in order to use it, such agreement and wall is an encumbrance.

The plaintiffs offered to prove at the trial that they did not know that the wall rested upon any part of lot 8. This testimony was excluded, and we think properly so. Whether or not the plaintiffs had such knowledge is immaterial to their right of action. A covenant against encumbrances covers those unknown as well as those known at the time of the purchase: *Barlow v. McKinley*, 24 Iowa, 69; *McGowen v. Myers*, 60 Iowa, 256; *Burk v. Hill*, 48 Ind. 52; 17 Am. Rep. 731; *Huyck v. Andrews*, 113 N. Y. 81; 10 Am. St. Rep. 432; *Herrick v. Moors*, 19 Me. 313; *Prichard v. Atkinson*, 8 N. H. 335; *Clark v. Estate of Conroe*, 38 Vt. 469; *Kellogg v. Malin*, 50 Mo. 496; 11 Am. Rep. 426; *Hubbard v. Norton*, 10 Conn. 422; *Parish v. Whitney*, 8 Gray, 516; *Long v. Moler*, 5 Ohio St. 271. The judgment of the district court is reversed, and the cause remanded for further proceedings.

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**COVENANTS—ENCUMBRANCE ON LAND, WHAT IS.** — An encumbrance, within the terms of a covenant against encumbrances, includes every right or interest in land to the diminution of the value of the land: *Huyck v. Andrews*, 113 N. Y. 81; 10 Am. St. Rep. 432, and note; extended note to *Gibson v. Holden*, 56 Am. Rep. 163. A right to procure ice from premises is an encumbrance: *Smith v. Davis*, 44 Kan. 362. An assessment by a drainage commissioner is an encumbrance: *Lindsay v. Eastwood*, 72 Mich. 336. A tax is an encumbrance: *Harper v. Dowdney*, 113 N. Y. 644.

**COVENANT AGAINST ENCUMBRANCES — WHETHER RUNS WITH THE LAND.** — A covenant against encumbrances is a real covenant running with the land: *Foots v. Burnet*, 10 Ohio, 317; 36 Am. Dec. 90, and note; note to *Morse v. Garner*, 47 Am. Dec. 572. A covenant to build a party-wall runs with the land: *Gibson v. Holden*, 115 Ill. 199; 56 Am. Rep. 146, and extended note discussing covenants running with the land.



## MAGNEAU v. CITY OF FREMONT.

[30 NEBRASKA, 342.]

**OFFICERS DE FACTO — EFFECT OF ACTS OF.** — The acts of *de facto* officers, so far as they involve the interests of the public or third persons, are valid.

**OFFICERS DE FACTO — CITY COUNCILMEN — EFFECT OF ACTS OF.** — City councilmen holding over after their term of office has expired, and after their successors have been elected and have qualified, but before the latter have taken their seats, are *de facto* officers, and their acts are valid.

**MUNICIPAL CORPORATION — ORDINANCE — PASSAGE OF.** — Under the Nebraska statutes, the council of any city of the second class having more than five thousand inhabitants may, when lawfully in session, pass any ordinance by the concurring vote of a majority of the members of such council, or by the affirmative vote of one half thereof with the concurrence of the mayor.

**MUNICIPAL CORPORATIONS — SESSION OF CITY COUNCIL — VALIDITY OF ORDINANCE.** — When the mayor of a city and all the members of its common council meet in special session and act as a body, they may, at such meeting, or at any adjourned session thereof at which a quorum is present, legally pass any ordinance within their power, notwithstanding no written call for such special session, specifying its purpose, was made by the mayor or two councilmen as required by law.

**MUNICIPAL CORPORATIONS — OCCUPATION TAX — CONSTITUTIONALITY OF.** — Under a constitution providing that the legislature shall, by general law, provide needful revenue by levying taxes by valuation, which shall be uniform as to the classes upon which they operate, and that the legislature may vest municipal corporations with power to assess and collect taxes which shall be uniform in respect to persons and property affected, the legislature may, by general law, confer power upon cities and towns to impose occupation or license taxes for municipal purposes. The only restriction imposed is, that the taxes so levied shall be uniform as to class.

**MUNICIPAL CORPORATIONS — OCCUPATION TAX — CONSTITUTIONALITY.** — An ordinance imposing an occupation tax or license fee for the privilege of carrying on certain kinds of business in a city, making no exceptions in favor of or against any one carrying on each business taxed, but operating uniformly on each class to which it applies, is not rendered unconstitutional for want of uniformity, from the fact that it does not classify each business taxed, and graduate the amount that shall be paid by the person pursuing such business according to the amount of business done by him.

**MUNICIPAL CORPORATIONS — OCCUPATION TAX — ORDINANCE VOID IN PART — PENALTY.** — While the penal provision for the enforcement of an ordinance imposing an occupation or license tax is void, that does not invalidate its other valid parts when such parts form a complete ordinance, and are not dependent upon the void portion.

*N. H. Bell and C. Hollenbeck*, for the appellants.

*Frank Dolezal and W. H. Munger*, for the appellees.

**NORVAL, J.** This suit was brought in the district court of Dodge County, to enjoin the collection of certain occupation

taxes imposed upon various occupations within the city, by ordinance No. 231, and to have said ordinance declared void. The district court found the issue in favor of the defendants, and dismissed the action. The plaintiffs appeal.

The city of Fremont is a city of the second class having over five thousand inhabitants. It is divided into four wards, and under the act or charter which governs cities of that class, is entitled to eight councilmen, two from each ward. At the general election held in said city on the first day of April, 1890, E. N. Morse was elected councilman from the second ward, as the successor to J. J. Lowry, and D. Hein was elected from the third ward, as the successor to C. A. Peterson. At a session of the city council held on April 3, 1890, the votes cast at the last city election were canvassed, and Morse and Hein were declared elected. This meeting was adjourned to April 4th, when the ordinance in question was introduced and read for the first time. An adjourned session was held on April 5th, when the ordinance was read the second time, and the meeting was adjourned to April 9th. On that date the council met pursuant to adjournment, when the ordinance was read a third time and passed. There were present and participated at this session, besides the mayor, councilmen Biles, Esmay, Plambeck, Harms, Wilcox, Peterson, and Lowry. On April 7th, prior to the passage of this ordinance, the councilmen elect, Morse and Hein, qualified.

It is contended by the appellants that the ordinance was never legally passed, for the following reasons: "1. That there were not present at its passage a quorum of the legal members of the city council; 2. That a sufficient number of the legal members of that body did not vote in favor of the passage of the ordinance; 3. Because the mayor had no legal right to vote upon its passage; 4. Because the ordinance was passed at a meeting at which the council had no authority to pass an ordinance."

The first two objections will be considered together. It is conceded that all who participated at the meeting when the ordinance was adopted were legal members of the council, except Peterson and Lowry, whose right to act is questioned, on the ground that their successors had previously qualified on April 7th. The statute requires that two thirds of all the members of the council shall be necessary to constitute a quorum for the transaction of business. It is obvious that if Peterson and Lowry could not lawfully act with the council at

that meeting, no quorum was present, and the ordinance is invalid.

Section 12 of article 2, chapter 14, Compiled Statutes, provides that in cities of the second class having more than five thousand inhabitants there shall be elected annually in each ward one councilman, who shall hold his office for a term of two years, and until his successor shall be elected and qualified. There being no statutory provision fixing a particular date when the term of office of a councilman shall begin, it is believed that the provisions of said section 12 control, and that the term of such officer commences immediately after the person elected has qualified.

While Morse and Hein had qualified, they had not, as yet, taken their seats in the council, or participated in the proceedings of that body. The names of Lowry and Peterson appeared upon the roll of members, and they were recognized as such by other members of the council, as well as by the mayor and city clerk. They took part in the proceedings of the council on April 9th without objection from any one, although Morse and Hein were at the time in the council chamber. We conclude, therefore, that Messrs. Morse and Hein were *de jure* officers, and that Lowry and Peterson were *de facto* members of the city council.

The cases are numerous which hold that the acts of a *de facto* officer, so far as they involve the interests of the public or third persons, are as valid and binding as though he was an officer *de jure*.

In *Ex parte Johnson*, 15 Neb. 512, the petitioner had been tried upon a criminal complaint before a justice of the peace, convicted, and fined, and ordered committed to jail until the fine and costs were paid. He applied to this court for a writ of *habeas corpus*, alleging that the justice of the peace before whom he was convicted usurped said office without authority of law. It was held that as the justice was a *de facto* officer, his acts were valid, and the writ was denied.

In *State v. Gray*, 23 Neb. 365, it was held that "the acts of councilmen *de facto*, within the power of the statutes, will be recognized and upheld."

In *Braid v. Theritt*, 17 Kan. 468, the defendant exercised the duties of councilman of the city of Wathena after his successor had been elected and qualified. It was held that Theritt was a *de facto* officer.

The case of *Morton v. Lee*, 28 Kan. 286, was a suit brought

by Lee to enjoin the collection of a judgment rendered by one A. J. Buckland, as justice of the peace after his term of office had expired, and after the election and qualification of his successor. It was held that Buckland was a justice of the peace *de facto*, and his acts as such were valid. The following cases support the same doctrine: *Norton v. Shelby Co.*, 118 U. S. 445; *Carli v. Khener*, 27 Minn. 292; *Leach v. People*, 122 Ill. 420; *People v. Bangs*, 24 Ill. 184; *Trumbo v. People*, 75 Ill. 561.

It follows, from the reason of these cases, that the acts of Lowry and Peterson are valid, and that there was a quorum of the city council present at the time the ordinance was adopted. The authorities cited in the brief of plaintiffs do not, in any manner, conflict with the rule for which we contend in this case, but sustain the proposition that the acts of officers *de facto* are invalid as to the person performing the duties of the office, and are no protection to him.

It appears from the record that four members of the council and the mayor voted in favor of the passage of this ordinance, three voted against it, and one was absent. Whether a sufficient number voted in the affirmative depends upon whether the provisions of section 18, or those of section 30, of article 2 of chapter 14, Compiled Statutes, control and govern cities of the class of Fremont, in the passage of ordinances.

Section 18 provides that "the mayor shall preside at all meetings of the city council, and shall have a casting vote when the council is equally divided, except as otherwise herein provided, and none other, and shall have the superintending control of all the officers and affairs of the city, and shall take care that the ordinances of the city and of this act are complied with."

Section 30 provides that "on the passage or adoption of every resolution or order to enter into a contract by the mayor and council, the yeas and nays shall be called and recorded; and to pass or adopt any by-law, ordinance, or any such resolution or order, a concurrence of a majority of the whole number of members elected to the council shall be required; *provided*, that the concurrence of the mayor and one half of the whole number of members elected to the council shall be sufficient to pass any such ordinance, by-law, resolution, or order."

Section 18, standing alone, sustains the construction contended for by the plaintiffs and appellants, that the mayor

can only vote when the council is equally divided. The language used in section 30 is plain and explicit, "that the concurrence of the mayor and one half of the whole number of members elected to the council shall be sufficient to pass any such ordinance."

In construing statutes, effect, if possible, must be given to every part of the law. Effect can be given to all the provisions of both sections by holding that the section first above quoted does not apply to the passage of ordinances, by-laws, or resolutions, but relates to the other proceedings of the council. Holding, as we do, that section 30 authorizes, when a quorum of the council is present, the passage of ordinances by the affirmative vote of one half of all the members of the council, with the concurrence of the mayor, the ordinance under consideration received a sufficient affirmative vote to adopt the same.

The appellants claim that the case of *State v. Gray*, 23 Neb. 365, conclusively settles the present case in their favor. We do not think so. The court, in that case, had under consideration sections 10, 76, and 79 of the act which governs and controls cities of the second class containing a population of less than five thousand, being article 1, chapter 14, of Compiled Statutes. The only difference between section 10, construed in that case, and section 18, involved in this, is, that the former section does not contain the words "except as otherwise herein provided." Sections 76 and 79 each provides that to pass an ordinance it requires the concurrence of a majority of all the members elected to the council. Neither of said sections provides "that the concurrence of the mayor and one half of the whole number of members shall be sufficient to pass any such ordinance." In that respect the provisions of said sections are different from those contained in section 30, which we have been considering. The court in *State v. Gray*, 23 Neb. 365, held, and we think correctly, that section 10 therein construed did not apply to the passage of ordinances, and that it required the concurrent vote of the majority of whole number of members of the council to adopt an ordinance. It is obvious that the provisions of section 30 and those of sections 76 and 79 are so different that the decision reported in 23 Nebraska does not in any manner conflict with the views expressed in this opinion; but, on the other hand, sustains us in holding that section 18, copied above, does not refer to the passage of ordinances.

It is also claimed that the city council had no authority to pass ordinance 231 at the meeting at which it was adopted. Ordinance No. 3 of the city of Fremont provides that the regular meetings of the council shall be held on the last Tuesday of each month. It is conceded that the ordinance under consideration was not acted upon at such a meeting, nor at any adjourned session thereof.

It is provided by ordinance No. 79 that the mayor and council shall meet on the Thursday following each city election, and canvass the returns of the votes cast at such election. A meeting was held April 3d, when the votes cast at the city election held on April 1st were canvassed. Prior to this meeting a call was issued by the mayor for a meeting of the council on April 3d to canvass the votes of the city election, and to transact any business that might lawfully come before the council. At the meeting held on April 3d, the mayor and all the members of the council were present except Archer. This meeting was adjourned to the following day, at which time, the mayor and all the councilmen being present, the ordinance was introduced, read the first time, and the meeting adjourned to April 5th. On that date there were present the mayor and all the councilmen except Plambeck. The ordinance was then read a second time, and an adjournment taken to April 9th. On the last-named date, all the members of the council being present except Archer, the ordinance was read a third time and passed.

The meeting held on April 3d was for the special purpose of canvassing the returns of the city election. Had it been a regular meeting, then any corporate business could have been lawfully transacted at any adjourned session thereof. The statute authorizes the mayor or any two councilmen to call special meetings. Whether the call must specify the object of such a meeting the statute is silent, and the decisions of the courts are conflicting upon that question. At any rate, the purpose and object of the call is to apprise the members of the proposed meetings, so that they may attend. So it seems clear to us that when all the members of the council and the mayor meet and act as a body, they may, at such meeting, or at any adjourned session thereof, transact any business within the powers conferred by law, notwithstanding no written call for the meeting was made by the mayor or two councilmen, or in case one was made which failed to specify the purpose of the meeting.

At the session held on April 4th, at which the ordinance was introduced and read, the mayor and all the members of the council were present and acted. All the members were notified of the meeting at which the ordinance was read the second time, by the adjournment of the previous meeting when all were present, and all had notice of the meeting at which the ordinance was passed, by the adjournment of the meeting held on April 5th, except Plambeck, and he was present and participated at the meeting when the ordinance was finally passed. In view of these facts, we must hold that the council was in lawful session when each step was taken in passing this ordinance.

It is urged that subdivision 8 of section 52 of the act governing cities of the second class having over five thousand inhabitants, which authorizes a city to levy and collect a license tax on any occupation or business carried on within the corporate limits, violates sections 1 and 6 of article 9 of the constitution.

Section 1 of said article provides that "the legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property and franchises, the value to be ascertained in such manner as the legislature shall direct; and it shall have power to tax peddlers, auctioneers, brokers, hawkers, commission merchants, showmen, jugglers, innkeepers, liquor dealers, toll-bridges, ferries, insurance, telegraph, and express interests or business, vendors of patents, in such manner as it shall direct by general law, uniform as to the class upon which it operates."

Section 6 provides that "the legislature may vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessments, or by special taxation of property benefited. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same."

It has been the uniform holding of this court that the constitution is not a grant, but a restriction of legislative power, and that the legislature may legislate upon any subject not inhibited by the constitution: *State v. Board of Co. Comm'rs*, 4 Neb. 537; 19 Am. Rep. 641; *State v. Board of Co. Comm'rs*, 8 Neb. 124; 30 Am. Rep. 819; *Hanscom v. City of Omaha*, 11 Neb. 37; *State v. Ream*, 16 Neb. 685; *Shaw v. State*, 17 Neb. 334.



In *State v. Bennett*, 19 Neb. 191, this court had under consideration section 1, article 9, of the constitution, and subdivision 8 of section 69 of "an act to provide for the organization, government, and powers of cities and villages," passed in 1879, which empowers cities containing less than five thousand inhabitants to impose an occupation tax. It was held that the constitution and statute both conferred the power to levy and collect such a tax.

While the legislature has authority to enforce a tax upon occupations, it is evident that section 1 of the constitution above referred to does not prohibit the legislature from conferring, by general law, power upon cities and villages to impose occupation taxes for municipal purposes. The only restriction imposed is, that the taxes shall be uniform as to class.

The above-quoted section 6 of the constitution was not referred to or considered by the court in *State v. Bennett*, 19 Neb. 191. It therefore only remains to be determined whether the provision of that section prohibits the legislature from conferring upon municipal corporations the power to levy occupation taxes.

It is claimed by appellants that this section of the constitution has reference to taxation by valuation. We do not think so. The language used is: "Such taxes shall be uniform in respect to persons and property." If it was the intention of the framers of the constitution to limit a municipal corporation to the imposing of taxes on property, why was the word "persons" specified in the section? It was evidently inserted for the purpose of authorizing the levy and collection of occupation taxes.

Sections 1 and 6 of article 9 of our constitution are identically the same as sections 1 and 9 of the ninth article of the constitution of Illinois, which were construed by the supreme court of that state in 1873, before the adoption of the constitution of this state, in *Wiggins v. City of Chicago*, 68 Ill. 378. Mr. Justice Walker, in delivering the opinion of the court, observes: "The ninth section, article 9, of the constitution declares that the general assembly may vest the municipal authorities of cities, towns, and villages with authority to assess and collect taxes for corporate purposes; 'but such taxes shall be uniform in respect to persons and property, within the jurisdiction of the body imposing the same.' To give full

effect to this provision, we must hold that it embraces more than the mere assessment and imposition of a uniform tax on property. It evidently was designed to include the various modes of collecting taxes of persons pursuing various avocations. And in the first section of the same article, the legislature is authorized to tax peddlers, auctioneers, etc. The tax here provided for is manifestly the sum of money which shall be paid to enable them to pursue their calling. Their property was required to be assessed by the first clause of the section, as it falls within the language employed; hence it follows that the tax last referred to, as applied to the classes of persons enumerated, is a personal tax, imposed upon the person exercising the calling, and has no reference whatever to his property."

We are clearly of the opinion that the provision of subdivision 8 of section 52, article 2, chapter 14, Compiled Statutes, is not repugnant to the constitution.

It is, however, urged that the ordinance is void because the taxes imposed by it are not uniform in respect to the classes upon which they are levied. The ordinance imposes a fixed sum upon each of the various avocations therein named. The fact that it does not classify each business and graduate the amount that shall be paid by the person pursuing an avocation, according to the amount of business he shall do, is not a violation of the rule of uniformity prescribed by both the constitution and statute. It is not an income tax, but a license fee or tax for the privilege of carrying on business in the city. The ordinance makes no exceptions in favor of or against any one carrying on the business taxed, but operates uniformly on the class to which it applies.

Section 7 of the ordinance provides that any person violating any of its provisions shall, on conviction thereof, be fined not less than five nor more than fifty dollars, and be committed until the fine and costs be paid. Under the decision of this court in *State v. Green*, 27 Neb. 64, the penal provision for the enforcement of the ordinance is void. But that does not invalidate its other provisions, as the valid part is a complete act, and is not dependent upon the void portion: *State v. County Comm'rs*, 6 Neb. 474; *State v. Hardy*, 7 Neb. 877; *State v. County Comm'rs*, 17 Neb. 85; *State v. Hurds*, 19 Neb. 323; *Muldoon v. Levi*, 25 Neb. 457; *Messenger v. State*, 25 Neb. 674. The judgment of the district court is affirmed.

**OFFICER DE FACTO — EFFECT OF ACTS OF.** — The judgment of a judge *de facto* is valid: *State v. Carroll*, 38 Conn. 449; 9 Am. Rep. 409, and note. Acts of officers *de facto* are as effectual, so far as the rights of the public are concerned, as if they were officers *de jure*: *Burke v. Elliott*, 4 Ired. 355; 42 Am. Dec. 142, and note; note to *Hildreth v. McIntire*, 19 Am. Dec. 69.

**MUNICIPAL CORPORATIONS — POWER TO ENACT ORDINANCES.** — The power to enact a city ordinance must be vested in the governing body of a city, either in express terms or implied as incident to the powers expressly granted: *Anderson v. Wellington*, 40 Kan. 173; 10 Am. St. Rep. 175, and note. The legislature may confer upon a municipal corporation the power to enact ordinances not unreasonable or opposed to the general law of the state: *Mobile v. Yvile*, 3 Ala. 137; 36 Am. Dec. 441, and note. A law, resolution, or ordinance is valid if passed by a majority of those present at a legal meeting: *Cleveland etc. Mills v. Commissioners*, 108 N. C. 178.

**MUNICIPAL CORPORATIONS — OCCUPATION TAX — CONSTITUTIONALITY OF.** — A city ordinance prohibiting canvassing without a license is valid, if it is equal and uniform in its operation, and does not discriminate, and is not in violation of the federal constitution: *City of Titusville v. Brennan*, 143 Pa. St. 642; 24 Am. St. Rep. 580, and note. The authority of municipal corporations to license occupations exists by force of statute alone: *Bernaheimer v. City of Leadville*, 14 Col. 518; note to *Ex parte Gregory*, 54 Am. Rep. 528; extended note to *Robinson v. Mayor of Franklin*, 34 Am. Dec. 638.

**MUNICIPAL CORPORATIONS — EFFECT OF ORDINANCES VOID IN PART.** — Unauthorized provisions in a municipal ordinance do not invalidate the whole ordinance if they can be separated from the rest of the ordinance without mutilating it: *People v. Armstrong*, 73 Mich. 288; 16 Am. St. Rep. 578, and note.

**CASES**  
**IN THE**  
**COURT OF ERRORS AND APPEALS**  
**OF**  
**NEW JERSEY.**

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**LODOR v. McGOVERN.**

[48 NEW JERSEY EQUITY, 275.]

**MUNICIPAL CORPORATIONS — ABUTTING OWNER ENTITLED TO INJUNCTION TO RESTRAIN CITY COUNCIL FROM PAYING CONTRACTOR FOR IMPERFECT STREET WORK, WHEN.** — The owner of a city lot abutting on a street which is being paved in an imperfect manner, under a contract with the city, has a right in equity to an injunction to restrain the common council from paying for such imperfect work before a trial at law, where his property will be assessed for part of the cost thereof. But this is the complement of relief to which he is entitled, for a court of equity has no right to try and definitely settle the question between the city and the contractor, whether their contract has been or is being executed according to its terms. A court of law is the proper forum for the determination of that question, and a court of equity will not take cognizance of controversies that are alien to its genius and its methods of procedure. The bill in such case should be exhibited for the relief of the complainant, and also for all other land-owners similarly situated who desired to come in, and should show distinctly that the common council had been called upon to perform the duty the not doing of which forms the basis of complaint.

**COURT OF EQUITY WILL NOT RETAIN CAUSE FOR COMPLETE DETERMINATION, WHEN.** — A court of equity which has rightfully acquired jurisdiction to grant an injunction for a special purpose will not, as a matter of right, retain the cause for the purpose of settling all the issues, where such issues are properly determinable in a court of law only.

**BILL** for an injunction. The opinion states the case.

*William M. Lanning*, for the appellant.

*Samuel Walker, Jr., and Garret D. W. Vroom*, for the respondents.

**BEASLEY, C. J.** The characteristic facts constituting the basis of this litigation may be expressed in a few words. The

city of Trenton entered into a contract with Mr. Lodor, who is now the appellant, for the paving by him of the road-bed of one of its streets, the work to be done in a designated manner and with specified materials. The respondent Mr. McGovern is the owner of a lot abutting on that portion of the street so to be improved, and by reason of certain provisions in the charter of the city, he will be liable to be assessed for a part of the cost of such paving; and his complaint in his present bill is, that this work is being done by the appellant imperfectly, both with respect to materials and skill, in violation of his contract, and that the city, unjustly and to the manifest damage of the complainant, acquiesces in such misconduct, and is ready to pay for the work at the stipulated rate.

Upon the assumption that this undertaking is being treated in this objectionable manner, it is manifest that the complainant, Mr. McGovern, will sustain a wrong, unless he shall have judicial succor, for he will ultimately be compelled to pay for defective and inferior work and materials at the same rate as though they were perfect and superior. For such a wrong there must be a legal remedy of some sort, and it is obvious that in a common-law court such redress cannot be obtained. Before such tribunals, the complainant could not in any mode present the question whether this work had been properly done or not; for it has been repeatedly decided by the courts of this state that a land-owner thus situated cannot raise such an issue after such work has been done and its cost has been or is being assessed. Necessarily the citizen thus oppressed has the right to appeal to a court of equity for protection, and consequently the legal authority of McGovern to file this bill by force of the circumstances narrated must be unquestionable. The principle referred to was declared by Chancellor Zabriskie over twenty years ago in these words, viz.: "The only remedy in such a case, if the city authorities will not resist the claim, is in equity. If the land-owners stand by and see the city pay the contractor, they can have no relief against the assessment. This was so held by the court of errors in case cited by the counsel of the defendant: *Stats v. Jersey City*, 29 N. J. L. 441." Equitable jurisdiction was exercised in similar situations in the cases of *Bond v. Newark*, 19 N. J. Eq. 376; *Schumm v. Seymour*, 24 N. J. Eq. 144; and in *Liebstien v. Newark*, 24 N. J. Eq. 202.

But while the standing of the complainant in the tribunal to which he has appealed is not open to doubt, the important

question necessarily supervenes as to what is the nature and scope of the relief to which he is entitled.

This inquiry, it would seem, will be answered as soon as it shall have been precisely ascertained what is the wrong with which the complainant was and is threatened. Such wrong is plainly manifested on the face of his bill; it is, in a word, this: that the city authorities intend to pay the bill of this contractor at full contract prices, although the work and materials furnished by him are grossly imperfect. That this is the entire context of the complainant's grievance is obvious from the fact that if the municipal authorities had exhibited the opposite purpose, — that is, had declared that the contractor was in default, and that they would not pay until the job had been executed according to stipulation, — the complainant would have been destitute of all right to intervene in the affair, either at law or in equity. If the city, in its answer in this case, supported by its proofs, had shown that it intended to contest the contractor's right to these moneys, it appears to be indisputable that such showing would have utterly exploded the entire ground of equitable jurisdiction. In the face of such a demonstration, the complainant would have been stripped of every vestige of rightful status in a court of equity, and as a corollary, therefore, it follows that if he shall be protected against a voluntary payment of this money by the city, he will receive the complement of relief to which he is entitled.

And beyond this bound we think that in this class of cases the court of chancery has no jurisdiction. It has no right in the present instance to try and definitely settle the question between the city and Mr. Lodor whether their contract has been or is being executed according to its terms. In such a contest there is no quality that in the faintest degree subjects it to equitable cognizance; for it is the common case of a dispute respecting the performance of ordinary labor. For the breach of an undertaking of this kind, the remedy at law is convenient, and on all sides adequate. Indeed, it is so complete, that in a legal forum the contractor can recover nothing unless he can show substantial compliance in every particular with his stipulations, or if the promisee shall have accepted the imperfect work, he can, as a general rule, exact a diminution of the agreed price. Under such circumstances, I regard it as the universal rule that such contracts, under usual conditions, cannot be enforced in a court of equity; for to sanction such a jurisdiction would be revolutionize the entire course of

judicial procedure in this state. It will be noticed that in this instance the juncture is presented of an alleged refusal of a contractor to make his work conform to the terms of his agreement, and if equity can intervene in such a situation, so it can in every case in which a mechanic is deviating from his stipulations, and thus, when an injunction becomes incidentally necessary, the chancellor is made the superintendent of the universal labor of the state. Such a doctrine would be abnormal, and would tend to obliterate or confuse the boundary line that separates the jurisdictions of our legal and equitable tribunals.

Nor, in this connection, should it be overlooked that the assumption by the court of chancery of the right to formally settle the present litigation as between the city and this contractor has deprived the latter of a prerogative that is justly esteemed of the utmost importance. This is the position of things: the contractor asserts, and is ready to maintain before the proper forum, that he has, in every particular, performed his agreement; his right is undoubted to have that contention, if it be in dispute, settled by a jury; but the complainants insist that the city should not voluntarily admit and pay this claim. But in such a proposition, even if established, how is it that the contractor is to be deemed to have forfeited his right to a trial by the country? In point of fact, this controversy is between the complainant and the city. No fraud is alleged or proved, and if the city is willing to pay the contractor, certainly such willingness cannot be imputed to the latter so as to occasion a forfeiture of his rights.

In fine, bills of this sort are pure injunction bills, and will not, in a collateral way, draw to equity cognizance over controversies that are alien to its genius and its methods of procedure. It is not true, by any means, that when a court of conscience has acquired cognizance for one purpose, it thereby acquires cognizance over the entire controversy for all purposes. In the case before us, the appropriate litigants are the city on the one hand, and the contractor on the other; their forum is the legal one, and the complainant, being interested only to the extent that the moneys in question should not be voluntarily paid by the city, cannot change the forum for the purpose of settling the main controversy, — he cannot take away from the city and the contractor their right to have the matter in question determined by a common-law court. In the case of *Brown v. Edsall*, 9 N. J. Eq. 257, it was properly declared



by the chancellor that "the court of chancery in this state has never adopted the principle that, because its jurisdiction has once rightfully attached, it will retain the cause as a matter of right, for the purpose of complete relief." It is conceived that in no imaginable case would the divergence from sound principle be wider than to apply in the present instance the rule that when a court of equity has acquired jurisdiction to grant an injunction for a special purpose it may go on and decide all the issues. The present complainant cannot intervene except in the degree necessary for his own protection, and he cannot, in a collateral way, become the sole *arbiter litis*, and against the will of the real litigants transport them from the legal to the equitable tribunal.

There are, it is true, cases in this line in our reports in which the entire cause was disposed of in equity, but this was done without objection, and without consideration of the principle here discussed. Such cases, so far as they may appear to conflict with the rule here established, must be considered to be overruled.

The foregoing considerations have led this court to the conclusion that the present decree appealed from should be reversed.

But as we think, from the evidence in the case, that the appellant's claim is open to question, and that he should not be paid for the work done by him under present circumstances, we are further of opinion that the city should be enjoined from making such payment of any of the moneys that are alleged to have accrued under the contract in question, or which may hereafter be alleged to have accrued by force of the contract in question, until such injunction shall have been dissolved, or the appellant shall have established his right thereto by a suit at law. We also direct that the decree should contain a provision giving the complainant in the court of chancery the right to intervene and make defense in such action, but at his own risk with respect to costs, in case the city shall notify him that it will not make defense therein.

With respect to the formal errors to which exception was taken at the argument, we are of opinion that the bill should have been exhibited for the relief of the complainant, and also for all the other land-owners similarly situated who might desire to come in. This was a defect in the present procedure, and it was objected to in the answer. But that exception became inoperative when an amendment in that respect was

ordered. If such amendment was insufficient with regard to forum or extent, or the persons named in it as parties were not actually brought into court, objections on these accounts should have been taken before trial.

So we further think that it was necessary for the complainant to show distinctly in his bill that the common council had been called upon to perform the duty the not doing of which formed the basis of complaint; but we are of opinion that in view of the answer and proofs it sufficiently appears that the attitude of the common council was antagonistic to the complainant's position and that consequently the objection cannot prevail on final hearing.

The city should be directed to pay the costs of the complainant in the court of chancery.

No costs are allowed on the appeal.

**INJUNCTION — MUNICIPAL CORPORATIONS.** — Equity will enjoin the sale of land for payment for paving a street, where the assent of the owners of a majority of the feet fronting on the street was not obtained: *Holland v. Mayor*, 11 Md. 186; 69 Am. Dec. 195, and extended note discussing the issuing of injunctions to restrain the collection of assessments and taxes; extended note to *McCord v. Pike*, 2 Am. St. Rep. 92, discussing the remedies of taxpayers for illegal acts of the municipal corporation.

**EQUITY — JURISDICTION.** — A court of equity will determine all necessary questions of law and fact in the exercise of its legitimate jurisdiction: *Treadwell v. Salisbury Mfg. Co.*, 7 Gray, 393; 66 Am. Dec. 491. A chancery court will not entertain and try an issue of *devisee vel non*, though it is presented in connection with matters proper for equitable cognizance: *Simmons v. Leonard*, 89 Tenn. 622. A court of equity will adjust the whole of any controversy properly before it without remitting the parties to a legal remedy as to any part of it: *Bolling v. Vandiver*, 91 Ala. 375.

## **BROOK v. HUDSON COUNTY NATIONAL BANK.**

[48 NEW JERSEY EQUITY, 61A.]

**HUSBAND MAY SECURE DEBT DUE TO HIS WIFE BY CONVEYING HIS PROPERTY TO HER, WHEN.** — Where a husband, indebted to his wife for advances made by her to enable him to build upon lots owned by him, in fulfillment of a prior promise, makes to her a deed of the property just before a judgment is entered against him by another creditor, standing upon an equal footing with her, for a debt incurred by him before he acquired title to the lots, the wife receiving the deed without any design to defraud others by the form of the conveyance, such deed will not be avoided at the suit of such creditor, but will be sustained as a security for the amount for which the grantor was indebted to the grantee.

**BILL to set aside a conveyance. The opinion states the facts.**

*John Linn*, for the appellant.

*Gilbert Collins*, for the respondent.

**READ, J.** This suit was brought by the Hudson County National Bank to set aside a conveyance of two houses and lots on Jersey Avenue, in Jersey City, made by George P. Brock to his wife, Josephine Brock, the appellant. The deed was made on March 1, 1888.

The bank, the present respondent, obtained a judgment against the said George P. Brock in the supreme court of this state on the 30th of April, 1888.

This judgment was for \$1,559.06. Execution was issued upon it to the sheriff of Hudson County. That officer, finding nothing else, levied upon the two lots mentioned as the property of the defendant. The bank thereupon filed its bill in this case to have the deed from the defendant, George P. Brock, to his wife set aside, as against the bank, as a fraudulent conveyance.

A decree was advised and signed, adjudging that the said deed was void as to the bank, and ordering the property to be sold to pay the said judgment.

The facts proven in the suit seem to be these: George P. Brock owned the two lots before he married Josephine. He bought them in October, 1882. He paid in cash for one lot \$1,000, and gave a mortgage upon it for \$2,000. He paid in cash for the other lot \$1,500, and gave a mortgage upon it for \$1,500. At this time he was engaged to be married to Josephine. He borrowed of her \$2,000, which he used to make up the cash part of the consideration paid for the lots. It seems that she did not know of the purpose to which the borrowed money was to be applied. On the 30th of November, the month after that in which the purchase was made, he married her. After the marriage the husband erected upon the lots two buildings. The cost of each building was over \$16,000. He fixes the amount as between \$16,250 and \$16,500 each. The mortgages of \$2,000 and \$1,500, already mentioned, were paid off, and two mortgages, amounting to \$14,000, were put upon the improved property.

The property, as it then stood, had cost \$38,500, of which \$24,500 was paid in cash. This cash was paid mostly out of moneys which came from the wife, Josephine.

The evidence shows quite conclusively that from the wife's property there went into the hands of the husband \$20,785. Nearly all of it must have gone in the payments made upon this property.

This appears to be so, because the husband's own money could not have exceeded \$5,500, and it required nearly, if not quite, \$4,000 of this to make up the difference between the amount of money he received from his wife and the amount of cash he paid upon the property. I do not conceive, however, that it is at all important whether the wife's money was all put into the property or not.

The important matter is the ascertainment of the amount of money which was turned over to the husband. Both husband and wife testify that it was understood between them, at that time, that he should make a deed of the property to her. This he neglected to do, until the deed, now in question, was executed in 1888. These are the facts concerning the relations of the husband and wife toward each other touching the transaction.

In respect to the husband's relations with the bank, only one thing is worthy of remark. The debt for which the judgment was entered up against him arose in 1872,—long before the purchase by him of these lots,—by reason of his indorsement for another party. It therefore appears that the debt was not contracted upon the faith of his ownership of this property.

It is quite obvious that the execution of the deed by the husband was hastened by the suit of the bank against him.

In respect to the wife's position, it is evident that she knew but little of the management of this business by her husband, and it is equally evident that she had no fraudulent design in permitting the property to remain in the hands of her husband.

I think it true that she repeatedly urged her husband to make her a deed, and received it, when made, in good faith.

In this position of affairs, what are the rights of the respective parties? The view of the counsel for the bank is, that the property should be treated as having belonged to the wife all these years. Then he would have the court fix a lien upon this property on account of the money of the husband which went to help pay for it. This would compel the wife to redeem the judgment or submit to a sale of the property. Her interest in it would be in the surplus, after payment of the bank's

judgment and the mortgage. This was indeed the effect of the decree made in the court below.

In my judgment, this is a mistaken view of the legal condition of affairs, and the decree, I think, cannot stand in its present shape. There was no resulting trust in the wife. There was no interest in the wife in this real estate, legal or equitable. She was a creditor of her husband. So was the bank. Both stood upon an equal footing in this respect. Morally, the right of the wife to a payment of her debt by a deed was superior, because the husband, when using her money, had so promised. But legally and equitably, I do not perceive any legal difference in their attitude at the time that the deed was made. Now, he chooses to secure his wife by making a deed to her. He had a right to secure or pay her for her advances. And although it may be that the value of the property is in excess of the debt, yet, she not being a party to any design to defraud others by the form of the conveyance, it will not be avoided because of its form as an absolute deed. Following the doctrine laid down in *Demarest v. Terhune*, 18 N. J. Eq. 532, and since recognized in several cases, the deed should not be set aside, but should be sustained as a security for the amount for which the grantor was indebted to the grantee. That amount is, I think, sufficiently proved to be \$20,785.

The decree below should be reversed, and a decree entered that the deed stand as security for that amount, and that the property, at the option of the bank, be sold, if any bid is obtained above the said sum, the property being sold subject to the mortgage upon it. If sold, then out of the proceeds the said amount of \$20,785 to be paid to the appellant.

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**HUSBAND AND WIFE — DEED FROM HUSBAND TO WIFE IN PAYMENT OF DEBT.** — Where a wife at her marriage was possessed of a large estate which she allowed her husband to dispose of upon his promise to settle upon her other property of equal value, and after he had partly complied with the promise, an agreement for separation having been agreed upon, he made a deed for her benefit, the consideration for which was the excess of her property so disposed of over that settled upon her, together with her release of dower, and all claim for support, such deed was held valid against creditors: *Harvey v. Alexander*, 1 Rand. 219; 10 Am. Dec. 519; note to *Steele v. Ooon*, 20 Am. St. Rep. 715; extended note to *Cook v. Bremond*, 86 Am. Dec. 642; extended note to *Warren v. Brown*, 57 Am. Dec. 195.

**NEWHOFF v. MAYO.**

[48 NEW JERSEY EQUITY, 619.]

**LANDLORD AND TENANT — BUILDING STANDING ON LEASED LAND IS CHATTEL REAL, WHEN.** — Where a lease of land on which stands a building owned by the lessee contains a provision that such building may be removed by the lessee within a reasonable time after the expiration of the term, if the lessor shall not pay its value, to be determined by arbitration, such building is, during the running of the term of the lease, annexed to the land, and the interest of the lessee in both building and land is a chattel real.

**LESSEE OF LAND MAY GRANT RIGHT OF WAY OVER IT TO OTHERS, WHEN.** — A lessee of land, entitled to its exclusive possession, may, during the continuance of his term, dispose of and pass to another a right of way over the same, even though he has but an estate for years therein. When the servient and dominant estates are both for years, such right will have all the qualities of an easement during the running of the term, but will cease with the expiration of the estates upon which it depends.

**RIGHT OF PASSAGE NOT RESTRICTED TO SURFACE OF SOIL.** — When separate estates exist in the upper and lower portions of the same building, a right of passage may be created through the halls and passages above the surface as well as upon the surface itself.

**RENEWED LEASE IS CONTINUANCE OF ORIGINAL TERM, WHEN.** — When a lease provides for a renewal of the term, the renewed lease is deemed, in equity, a mere continuance of the original term for the protection and preservation of rights acquired therein.

**BILL for an injunction.** On November 1, 1854, the Third Presbyterian Church of Newark leased to Stephen Ford and Thomas Maplesden a lot on Broad Street, in Newark, 41½ feet wide by 166 feet in depth, for a term running to May 1, 1868. At the date of the demise, the lessees owned a frame building on the premises, covering the whole front, and extending back about eighty feet. The lower part of the building was occupied by a store, and the upper part as a dwelling, to which access was obtained from Broad Street by a stairway in a hall extending along the north side of the building, and by transverse passages above. By the terms of the lease, the lessees might renew for the further term of twenty years, at a rent to be agreed on or fixed by arbitration, and if they did not renew they might remove the building within a reasonable time after the expiration of the term, unless the lessor would pay them its value, to be fixed by arbitration. On April 18, 1855, Maplesden assigned to Ford all his interest in the building and term. On October 28, 1867, Ford sold, and by a deed *inter partes* conveyed, to Charles Garrabrant a part of the demised premises, of eighteen feet in width on Broad Street, and extending back a depth of one hundred feet along the north line of the premises. The

stairway, hall, and part of the transverse passages were in that part of the building, and the deed contained the following clause: "Subject, nevertheless, to the following reservations and conditions, that the hall extending back twenty-eight feet, and the stairway leading into the dwelling and upper part of the premises hereby conveyed, and the part now owned by said Stephen Ford, lying southerly of said last-described premises, shall be kept open and unobstructed for the use of said parties and their families, tenants and servants; and that said Ford, his family, tenants, servants, and legal representatives, shall have the right to use the stairway, passage, and cross-hall to and from any part of the premises owned by him adjoining the premises hereby conveyed; and with the further reservation, that the partitions in the third story of the building on the premises hereby conveyed shall remain as they are at this time, unless said building should be destroyed." On April 28, 1868, the church renewed the lease for the whole premises to Ford and Garrabrant, as tenants in common, for twenty years from May 1, 1868, upon terms as to further renewal and removal of the building, like those in the lease first described. By an agreement of September, 1869, between Ford and Garrabrant, the latter was permitted to reduce the width of the hall, but it was expressly agreed that the conditions and reservations in Ford's original assignment to Garrabrant should remain otherwise unaffected. On January 8, 1870, Ford sold and assigned to the respondent Mayo the remaining front of the demised premises for a depth of one hundred feet, together with the right and privilege reserved in the assignment to Garrabrant. Mayo used the lower part as a store, rented the upper stories, and he and his tenants gained access thereto by the passages in question. Ford had previously made similar use thereof. On January 14, 1874, Ford made another deed to Garrabrant, assigning the same interest which had been assigned by the deed of October 28, 1867, but subject to the conditions and reservations contained in that deed, to which it referred. In April, 1888, the church gave a lease to respondent Mayo for that portion of the premises which he had acquired by his assignment from Ford, and the lease contained like provisions respecting the removal of the building. Garrabrant's interest was sold under execution, and bought by his wife. In February, 1888, she and her husband, in writing, relinquished their rights to appellant, to whom the church, by another lease, gave a further term of twenty years from May



1, 1888, in that part of the premises which Ford had assigned to Garrabrant. This lease recited the facts, and particularly referred to the deed of January 14, 1874, as the source of Garrabrant's right of renewal, relinquished to appellant, and the lease was expressly declared to be a renewal of a part of the original lease. In November, 1889, appellant obstructed the passages, and cut off the access of Mayo and his tenant to the upper part of his building. The bill prayed that appellant might be restrained from such obstruction.

*Elias F. Morrow*, for the appellant.

*Frederic W. Stevens*, for the respondents.

MAGIE, J. This cause was heard below upon the bill alone. No answer having been put in thereto, the allegations of the bill are, therefore, to be taken as true, and the only question here is, whether, upon the facts alleged, the decree is erroneous.

The decree enjoins appellant from interfering with the use by respondent Mayo, his family, tenants, servants, and legal representatives, of certain stair and passage ways in a building in Newark, and from obstructing such ways, to their injury.

The facts alleged in the bill are set out with great particularity in the opinion of the learned vice-chancellor; but as a statement of some of them seems necessary to explain my views, a brief *résumé* precedes this opinion.

On behalf of appellant it was contended that the building in question is a mere personal chattel, and that in such a chattel no easement of way in favor of one part thereof over another part thereof can be acquired.

When a building has been erected by one on lands of another, upon an agreement, express or implied, that it may be removed at the pleasure of the builder or on the demand of the land-owner, the building is, no doubt, to be classed in that division of property which we call purely personal: *Pope v. Skinkle*, 45 N. J. L. 39. But in this case the building was attached to land in which its owners had an interest, classified, not as a mere chattel, but as a chattel real. By the terms of the lease the building could not be severed from its connection, until, at the expiration of the lease, the land-owner failed to exercise the option given him to take it at its appraised value. Under such circumstances, in my judgment

the building was annexed to land, and the interest of the lessees in both building and land was a chattel real. If, at the expiration of the term, the lessor did not take the building, the right to remove at the pleasure of the lessees would arise, and the building would become a mere chattel; but if the lessor exercised its option, and paid the appraised value, or probably if the lessees failed to remove within a reasonable time after the expiration of the term, the building would become annexed to the fee, and be classed as realty.

A lessee of land, being entitled to its exclusive possession during the continuance of the term, may, unless restrained by covenants, dispose of and pass to another, by appropriate acts, the whole or part of his interest. In this mode he may doubtless grant to others a right of passage over the land leased by him, which right would have all the qualities of an easement of way during the running of the term: *Wallace v. Fletcher*, 30 N. H. 434; *Gayford v. Moffat*, L. R. 4 Ch. App. 133.

A servitude of that character might be created in favor of any other estate, even though the latter be an estate of freehold, not of inheritance, or an estate less than freehold. That the servient and dominant estates are estates for life or years would not at all affect the qualities of the right so long as it continues, but only its duration. If the dominant estate is a terminable estate, the right of passage would cease when that estate terminated; if the servient estate is an estate of like character, the right of passage would (at least when created by grant of the lessee) cease when it terminated. Such a right, while it endures, has every characteristic of an easement, and should be governed by the rules relating to such incorporeal hereditaments.

The grant of a right of passage need not be restricted to the surface of the soil. Separate estates may exist in upper and lower portions of the same building, and in the surface of the soil and the underground strata. When such an estate exists in an upper story of a building, or in the surface of land, there are, of necessity, attached thereto easements of support, and in the case of a building, of access from the lower stories: Washburn on Easements, 588, 595. As ownership extends, unless restrained by the grant, indefinitely upward and downward, a right of passage may be created through vaults and cellars under the surface, and through halls and passages above the surface, as well as upon the very surface.

It is next urged that there has been no grant of the right of passage claimed.

The deed of October 28, 1867, which passed to Garrabrant a right to that portion of the demised premises on which the hall, stairway, and passages are located, contained an express reservation of the right to use such passages to Ford and his legal representatives, for the benefit of the remainder of the demised premises retained by Ford.

It is contended that the right thereby created, if any, was one merely personal to Ford, and has ceased by his death. That Ford is dead does not appear in the printed case. But that circumstance I deem of no importance. The right intended to be created was only a right in an estate for years and in favor of an estate for years. These interests do not descend to heirs, but pass to executors and administrators. They can be created without the use of the words "heirs," and therefore any interest in them can be so created. The reservation to Ford and his legal representatives would sufficiently create such an interest if it is effective as a grant.

Such a reservation amounts to a grant of a right of passage: Washburn on Easements, 29. As the deed was *inter partes*, the right reserved would have been deemed granted, although Garrabrant had not executed the deed: *Earle v. New Brunswick*, 38 N. J. L. 47; *Cooper v. Louanstein*, 37 N. J. Eq. 284; *Rosenkrans v. Snover*, 19 N. J. Eq. 420. But Garrabrant actually executed both deeds in which the reservation was contained, and so formally granted the way over the interest he thereby acquired.

I conclude, therefore, that by the very terms of the reservation in the deed between Ford and Garrabrant, a right of passage or way over the hall, stairway, and transverse passages in that part of the building now leased to appellant, in favor of that part now leased to the respondent Mayo, was created, which had all the qualities of an easement, but it was imposed upon an estate for years in favor of a like estate, and would terminate whenever the dominant or servient estate ceased to exist in persons entitled to or affected by the creation of the right.

When the right of passage was created, Ford, by the assignment of Maplesden, had acquired the sole interest in the demised premises, and the right to a renewal and extended term. Ford's assignment to Garrabrant of a portion of the demised premises admitted the latter to an interest in the same, includ-

ing a right in any renewed or extended term. The extended term was granted to Ford and Garrabrant as tenants in common. While they thus obtained a common title to the whole demised premises, it does not admit of a doubt that they each became in equity entitled to the several possession of those parts thereof into which they had divided them for several occupancy. The renewed term was, however, a mere continuation of the former term.

A grant of a right in demised premises by one having a terminable lease, with a right of renewal, will not cease to have effect on the termination of the lease, if there is, in fact, a renewal thereof. The renewed lease is deemed, at least in equity, to be a mere continuance of the original term for the preservation and protection of rights acquired therein: Taylor on Landlord and Tenant, sec. 340; Woodfall on Landlord and Tenant, 678, 680; 1 Platt on Leases, 762; *Ex parte Grace*, 1 Bos. & P. 376; *Waters v. Bailey*, 2 Younge & C. 219; *Holridge v. Gillespie*, 2 Johns. Ch. 30; *Phyfe v. Wardell*, 5 Paige, 268; 28 Am. Dec. 430; *Gibbs v. Jenkins*, 3 Sandf. Ch. 180; *Mitchell v. Reed*, 61 N. Y. 123; 19 Am. Rep. 252.

When, therefore, Ford and Garrabrant renewed their lease in common, but for their several benefit, their renewed rights bore the previous relation. The right of passage continued imposed on the servient estate in favor of the dominant.

When the lease given to Ford and Garrabrant expired, new leases were given to those who had become entitled to separate portions of the demised premises. Respondent Mayo procured a new lease for that portion to which he had acquired a right under Ford's assignment. Appellant procured a lease for that portion to which Garrabrant had acquired a right under Ford's assignment, which right had passed to his wife, and had been relinquished in favor of appellant. Each renewed term was a continuance of the former interest. Appellant's term was expressly declared by her lease to be a renewal of the original lease. Thereby all the rights previously acquired were preserved and continued.

Appellant further contends that she had no notice of the right of passage over the premises when she took her lease. There are two answers to this contention. In the first place, she acquired her right to renew, by virtue of which she obtained the lease from Garrabrant. He had created the right of passage, and could not convey to her a greater right than he thereafter possessed. In the next place, there was notice to

appellant, both in the open and plain user, apparent from the construction of the building, and from the reference made in her lease to the title of Garrabrant, under whom she obtained it. That title disclosed the existence of the right contended for.

For these reasons I think the decree right, and shall vote to affirm it.

I may add, that had I adopted the views of the vice-chancellor as to the classification of this building as a purely personal chattel, I should have had no difficulty in reaching the conclusion he arrived at. For I doubt not that, in a chattel of such peculiar character, rights may be created in all respects analogous to those rights which are called easements; that when the parties in interest create such rights, they are not objectionable as opposed to public policy, nor as not capable of being the subject of contract, and that such rights may and should be protected by the courts as the analogous easements would be.

Affirmed.

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LEASE — RENEWAL — HOW REGARDED. — A renewed lease is regarded as a mere continuance of the original lease in equity for the protection of those concerned, subject to the additional charges on the renewal, where the renewal is obtained by being in possession under the original lease, or having an interest in it: *Phyfe v. Wardell*, 5 Paige, 268; 28 Am. Dec. 430, and note; extended note to *Blumenberg v. Myers*, 91 Am. Dec. 563.

**CASES**  
**IN THE**  
**COURT OF CHANCERY**  
**OF**  
**NEW JERSEY.**

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**IN THE MATTER OF THE TAXATION OF THE PENNSYLVANIA TELEPHONE COMPANY.**

[43 NEW JERSEY EQUITY, 91.]

**INTERSTATE COMMERCE — TELEPHONE MESSAGES SENT FROM ONE STATE INTO ANOTHER ARE.** — The sending of messages by telephone from one state into another is commerce between the states, and cannot be prohibited by injunction in either state against persons or corporations engaged in sending such messages because they do not pay the taxes assessed against them by such state. But a court of chancery has no authority to go beyond the consideration of the constitutional question, and set aside the assessment as illegal. That can only be done in a court of law.

**BILL** for an injunction. The opinion states the facts.

*The Attorney-general*, for the state.

*William S. Gummers*, for the respondent.

**BIRD, V. C.** The respondent in its answer to the petition in this case admits its liability to be assessed under the act of April 18, 1884 (Rev. Sup. 1016), but denies its liability for the whole amount of assessment imposed by the state board of assessors. The law provides "that every telegraph, telephone, cable, or electric-light company, not owned by a railroad company and otherwise taxed, doing business in this state, should pay an annual tax for the use of the state, by way of a license for its corporate franchises."

The law requires every such company, on or before the first Tuesday of May, to state the gross amount of its receipts from the business done in this state for the year preceding the first day of January prior to the making of such report. If any

Such company shall neglect or refuse to make such return within the time limited as aforesaid, the state or its assessors shall ascertain and fix the amount of such receipts in such manner as may be deemed by them most practicable, and the amount fixed by them shall stand as the basis of taxation of such company under said act. By virtue of said act, each of said companies is made liable to pay taxes of two per cent upon the amount of its gross receipts so returned or ascertained. On or before the first Tuesday of May, 1888, the respondent did make a report showing the amount of its gross receipts for the business done in this state for the year ending December 31, 1887. By such report such receipts appear to be \$8,643.47. It also reported, at the request of the state board of assessors, its gross receipts for business originating within this state and terminating without, \$8,122.53; and also the gross amount of receipts from business originating in Pennsylvania and terminating within this state, which amount was \$7,398.03.

On the twenty-fifth day of June, 1888, the respondent paid the state \$72.87, the amount properly assessed upon its gross receipts of the business done within this state, but the whole amount assessed by the state board of assessors was \$185.82. This shows that the assessors were not contented with the gross receipts returned by the respondent of business done within this state, but proceeded, as they supposed they might under the act, to ascertain what, in their judgment, was the proper amount of gross receipts to be assessed, from other sources, and assessed \$8,122.53, in addition to \$8,643.47. This additional assessment the respondent insists is unlawful.

Its resistance to the payment of this additional tax is based upon the doctrine that it is unconstitutional for any state to attempt to regulate commerce between the states; and that business of this character, originating in one state and terminating in another, is such commerce. I believe this principle was so recognized in the case of *Standard Underground Cable Co. v. Attorney-General*, 1 Dick. 270. In that case, Mr. Justice Knapp said, in delivering the opinion of the court of errors and appeals: "Railroads and telegraphs may become instruments of interstate or international commerce, and when, as such instrument, they are in action, they may not be obstructed by state impositions and restrictions; hence it was held in *Western Union Tel. Co. v. Attorney-General*, 125 U. S. 530, that the telegraph company having brought itself within



the provisions of the act of Congress of July 24, 1886, entitled 'An act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military, and other purposes,' that collection of a tax imposed upon the telegraph company on its property in Massachusetts could not be enforced by injunction, although the taxing act provided for that as one mode of enforcing payment; the reason being, that an injunction enforced in that state would put a stop to its general operations. The tax, however, was held to be valid, and the state was left to other remedies for its collection. *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, and *Telegraph Co. v. Texas*, 105 U. S. 460, are also instances of illegal interference with companies as instruments of commerce. But each of these cases holds the companies to be subject to taxation, otherwise legal, which does not obstruct or place a direct burden upon them, either as instruments of general commerce or as agents of the United States. The case of *Coe v. Errol*, 116 U. S. 517, marks the point where the subjects of commerce pass out of the state's power to tax and come within federal protection. That point is not reached when they become finished production. It is there held that goods, the product of a state, intended for exportation to another state, are liable as part of the general mass of property of the state of another origin until actually started in course of transportation to the state of their destination, or are delivered to a common carrier for that purpose."

These principles are as applicable to messages by telephone as to merchandise. There can be no reasonable distinction made between the office of common carrier of telephone and the office of a common carrier of goods by railway or steamboat. In both cases it is commerce between the states. In every such instance the consideration is, when is the transaction within the constitutional regulation? The disputes which have led to judicial determination of the various questions have been respecting those conditions which upon the one hand were deemed commerce and upon the other not.

I think, therefore, the injunction prayed for in this case ought not to be allowed; for if it were to be allowed, it would most certainly, though indirectly, control commerce between states.

But beyond this I do not feel at liberty to consider the question as to the legality or illegality of the assessment. I can only say that a proper case is not made out for the interference

of this court. To determine whether this assessment shall stand or be set aside, or not, is the province of the courts of law. The power given to this court by the statute extends only to granting injunctions where taxes assessed are not paid. No authority whatever is conferred to review such assessments. Whatever the result may be practically, in every such case as the one now before the court, it seems to me it would be a plain usurpation for this court to attempt to set the assessment aside in this or in any other such case. That the constitutional question may be considered by the court of chancery was expressly decided in the case of *Standard Underground Cable Co. v. Attorney-General*, 1 Dick. 270. But, as has been shown, the question in that case only pertained to the propriety of issuing an injunction, and no other question has been considered in this. If the respondent desires a declaration that this assessment, in excess of the \$3,643.47, be set aside, it must seek it in another forum.

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**INTERSTATE COMMERCE — TELEGRAPH COMPANIES.** — A statute providing for a tax of two per cent on the gross receipts of telegraph companies is not an infringement of the federal constitution as to interstate commerce, nor of a provision of the state constitution that taxes shall be assessed in exact proportion to the value of the property, and not to exceed one per cent of such value: *Western Union Tel. Co. v. State Board of Assessment*, 80 Ala. 273; 60 Am. Rep. 99. The fact that a telephone company has extended its lines through different states, and is engaged in interstate commerce, will not relieve it from the operation of state statutes, upon business conducted wholly within the state: *Central etc. Telephone Co. v. Falley*, 118 Ind. 194; 10 Am. St. Rep. 114, and note.

**TAXES — ASSESSMENT — POWER OF EQUITY TO REVIEW.** — A court of equity cannot review the action of an assessor in making an assessment, unless it can be shown that the legislature, in authorizing the tax, disregarded or transcended the principles of equality, or that a tax unauthorized by law has been levied, or that the property assessed was not liable to taxation: *Horse etc. R. R. Co. v. Donoghue*, 127 Ill. 27; 11 Am. St. Rep. 90, and note. Equity will not relieve against an assessment for taxation on the ground that such assessment is too high, where the excess is the result of an honest error of judgment of the assessor. In such a case relief must be sought through the remedy provided by statute: *Buttenuth v. St. Louis etc. Co.*, 123 Ill. 535; 5 Am. St. Rep. 545.

**CARVER v. TODD.**

[43 NEW JERSEY EQUITY, 102.]

**CONVEYANCE BY DEVISEE IN EXECUTION OF PROMISE TO TESTATOR UPHOLD AGAINST GRANTOR'S CREDITORS.** — Where a testator, after making a devise of land, wishing to compensate the devisee's wife for taking care of him in his last sickness, exacts from the devisee a promise to convey the land to the wife, after the testator's death, a conveyance made in execution of such promise will be upheld in equity against the creditors of the devisee.

**CREDITOR'S bill.** The opinion states the case.

*Martin L. Trimmer*, for the complainant.

*Henry A. Fluck and John L. Connet*, for the defendant.

**BIRD, V. C.** The judgment of the complainant should be declared to be a lien upon the lands in question prior to the conveyance under which the wife of the defendant claims, unless it appears to have been fully established that the grounds upon which she claims to hold the title have been clearly and satisfactorily supported by proof. It is alleged in the answer that the husband, the judgment debtor, was the devisee under the last will of Joseph B. Abbott, and that both the said husband and his wife took care of the said Abbott during the last eighteen months of his life, and that during that period he made said will and devised the land in question to Todd, the judgment debtor; and that before his death, and while upon his sick-bed, he made known the fact of his having made his will, and of the disposition he had made of the real estate, and mentioned the fact that Todd and his wife had taken care of him, and that he wanted the property to go to those who had so taken care of him, and that he requested Todd to convey the said lands to his wife. There is no allegation in the answer that Todd made any promise to the testator. The answer leaves it with the simple declaration that the testator made such request of Todd; but the testimony of Todd himself upon this subject is in these words: —

“Q. How did you come to make this deed?

“A. It was at Joseph Abbott's request, after he said that my wife had taken care of him through all his sickness, — looking after him; he said he wanted her to have it, and asked me if I would have any objections to it; so I told him I was perfectly willing that she should have it; he often talked to me about it while he was sick; he said he wanted me to give

it after his death; he always said that those who waited on him he wanted them to have his property; he had often talked to me about it, — several times, — and wanted me to do it after his death; I told him I was willing that she should have it; I told that to Mr. Abbott; the property did n't belong to me then; it was willed to me; Joseph Abbott and I entered into an article of agreement, and he willed it to me at that time; I knew when I had this talk with him that he had willed it to me."

Mrs. Todd testifies as follows: "Mr. Joseph Abbott stated that he wanted me to have the property; he made my husband promise on his death-bed that he would give it to me, because I had taken care of him; he said them that had taken care of him he wanted them to have it; I have taken care of him during his sickness altogether; I knew he had made a will, and he said that he wanted to change it now, and he thought that that would answer every purpose; my husband and I both promised at the time that it would be done; the property was deeded to me through my brother."

This testimony shows that the testator not only made known his wishes and the requests that the property should be conveyed to the wife of the devisee, but that the devisee promised that he would make such conveyance. It also appears that this request and promise were made at a time when the testator spoke of altering his will for the purpose of securing to Mrs. Todd the object of his desire.

Was this conveyance made by Todd to his wife a voluntary conveyance for the purpose of defrauding his creditors? or was it in execution of the promise he had made to the testator, and therefore in fulfillment of the trust? If the former, it is fraudulent and void as to the judgment of the complainant; but if the latter, the law declares that it would have been a fraud upon his part not to make the conveyance. It was declared in the case of *Williams v. Vreeland*, 32 N. J. Eq. 734, that such conveyances should be upheld in courts of equity, when the allegations upon which they rest are clearly and satisfactorily proved. As the citations in that case show, the principle which governs applies as well to real as to personal property taken in trust by devisees or legatees: See case of *Hoge v. Hoge*, 1 Watts, 163, 26 Am. Dec. 52, where the question is fully discussed. See note to *Thompson's Lessee v. White*, 1 Am. Dec. 258, and note to *Towles v. Burton*, 24 Am. Dec. 413. The parol proof is admitted, not to vary or contradict the terms of

the will, but to enforce the promises of devisees and legatees who take under a will, which promises have been made in consideration of such devises or bequests to them. All courts concede the justness of this principle in order to prevent fraud. Besides the authorities above referred to, I call attention to the following: *Williams v. Vreeland*, 32 N. J. Eq. 135; *Gaullaher v. Gaullaher*, 5 Watts, 200; *Chamberlaine v. Chamberlaine*, 2 Freem. Ch. 34.

After the very fullest consideration, I feel obliged to accept the testimony of the defendants upon this subject. No witnesses have been introduced to impeach their character, nor is there any circumstance in the case that tends to cast doubt upon the truthfulness of their assertions. The conveyance was not made to the wife until about nine months after the death of the testator, and this circumstance is laid hold of by counsel of the complainant as a complete answer to all the allegations respecting the promise made by Todd to the testator. But this, in my mind, is not so great a delay as to create any just grounds for suspicion. There can be no doubt but at that time the wife could have called upon this court to enforce the trust and compel the husband to execute the conveyance. According to his testimony, nothing could have prevented this result.

The bill will be dismissed, without costs.

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**TRUST ARISING BY OPERATION OF LAW.** — Where a devisee prevents a testator from making an intended provision for another, and for whom such a provision would have been made but for such intervention, such devisee will be held to be a trustee of any devise to himself to the extent it would have been for such other but for his interference, and he will be compelled to respond to such beneficiary: *Ragsdale v. Ragsdale*, 68 Miss. 92; 24 Am. St. Rep. 256, and note, where similar cases are collected; *Nordholt v. Nordholt*, 87 Cal. 552; 22 Am. St. Rep. 268.

**TRUST PROPERTY, WHETHER SUBJECT TO EXECUTION.** — A trust estate is not subject to execution in New Jersey: *Hogan v. Jaques*, 19 N. J. Eq. 123; 97 Am. Dec. 644; extended note to *McIlwaine v. Smith*, 97 Am. Dec. 303. A naked legal title held in trust cannot be sold on execution at law: *Baber v. Openbarger*, 15 Ill. 103; 58 Am. Dec. 600.

**CARROLL v. HAUSE.**

[48 NEW JERSEY EQUITY, 269.]

**UNDUE INFLUENCE OVER TESTATOR PRESUMED WHEN.** — Against a beneficiary under a will having the testator under his control, with power to make his will the will of the testator, especially in a case where the testator has made an unnatural disposition of his property, the law presumes undue influence, and puts upon such beneficiary the burden of showing affirmatively that when the testator made his will he did not exercise his power over the testator to his own advantage, and to the disadvantage of others having an equal or superior claim upon the bounty of the testator.

**UNDUE INFLUENCE, WHAT IS, TEST AND EFFECT OF.** — Whatever constrains a person to do what is against his will, and what he would not do if left to himself, is undue influence, no matter by what means the control is exercised. The extent or degree of the influence is wholly immaterial, for the test is, was the influence, whether powerful or slight, sufficient to destroy free agency, so as to make the act in question the act of another rather than the expression of the mind and heart of the actor? Undue influence exercised by any one, whether he or another gains by its exercise, renders the will or other instrument thus procured worthless.

*William B. Guild*, for the appellant.

*Charles Borchertling*, for the respondent.

**THE VICE-ORDINARY.** This is an appeal from a decree of the orphans' court of the county of Essex, refusing probate to a paper purporting to be the will of Patrick Monaghan, deceased. The reason assigned in the decree for refusing to admit the paper to probate is, that it had not been published by the decedent as his will in the manner required by the statute concerning wills. I cannot concur in that view, but for another reason I think the decree is clearly right, and should be affirmed. The proofs show very clearly, as I think, that the paper is the product of undue influence.

The decedent signed the paper in question on the twenty-sixth day of December, 1889, when he and those about him believed he was in the grasp of death, and could live but a very short time. He was very sick, and so extremely weak as to be unable to write his name; he signed the paper by making his mark; he was a Roman Catholic, and had, shortly prior to the day on which he signed the paper, been prepared for death according to the rites of that church. He did not, however, die until the sixteenth day of January following. He was a widower, and for more than a year prior to his sickness had lived alone in a single room. Up until a few months

before he was taken sick, he had, for many years, drank to excess, but then stopped suddenly, and afterward abstained rigidly. His only child, a daughter, died less than two years before he did. She died in child-bed. The caveator is her daughter, and the granddaughter of the decedent, and his heir at law nearest in blood. The paper in question disinherits the decedent's grandchild, and gives all his property to his sister, the appellant. She is his sole beneficiary. This sister and her husband had exclusive charge of the decedent from the commencement of his sickness up to the time of his death. Besides his grandchild and this sister, the decedent had a brother and nephew residing near him in this state, and other relatives in Ireland. He was a native of Ireland. He had a strong affection for his grandchild. This he manifested by both act and speech. During the last year of his life he said, many times, that she should have all of his property that was left after his debts were paid. He did not want to make a will. Both his sister and the priest having the care of his soul tried unsuccessfully, prior to the day on which the paper in question was signed, to persuade him to make a will. The priest says that the decedent was a very peculiar man, and did not wish to make a will, notwithstanding he had advised him, as it was his duty to do as his priest, that he ought to make a will. He says the first time he spoke to him about making a will the decedent did not think he was dying, and for that reason said he would defer making it until some future time. His sister swears that she never attempted to persuade the decedent to make a will, but her testimony on this point is, in my judgment, completely swept away by the other evidence in the case. There is evidence going to show that she urged him so persistently to make a will that he denounced her efforts as torture. Besides, it must be remembered that he was completely in her power. His condition was one of utter helplessness; he could do nothing for himself; he was dependent on her for everything; no comfort came to him except from her hands; she occupied a position, therefore, where she could dominate his mind and will with little danger of detection; where she could even constrain him to stifle the love he felt for his little grandchild, and make just such a will as she says he did make. Against a beneficiary thus having a testator under his control, with power to make his will the will of the testator, especially in a case where the testator has made an unnatural and unjust disposition of his property, the



law wisely presumes undue influence, and puts upon the beneficiary the burden of showing affirmatively that when the testator made his will he did not exercise his power over the testator to his own advantage, and to the disadvantage of others having an equal or superior claim upon the bounty of the testator: *Dale v. Dale*, 88 N. J. Eq. 274, 276.

The sister of the decedent swears that the desire to make the will in question originated with the decedent, and that he made this desire known to her on the afternoon of the 26th of December, 1889, while she was preparing food for him, by saying, "If I had a man I should like to draw a will"; that she replied, "All right," and then, after she had finished what she was doing, she went out and sent her husband for the priest. Her husband says that he went for the priest and told him that the decedent would like to have a will drawn, and asked him to come down and draw it. The priest, however, testifies that the husband said that the decedent was dying, and had made no disposition of his earthly goods, — not that the decedent wanted to have a will drawn. That the priest was not informed that the decedent wanted a will drawn, or that he desired to make a will, is made entirely certain by what the priest said to decedent when he called on him. He called a few hours after receiving notice that the decedent was dying. He says he went to decedent's bed and asked him, in the presence of two witnesses, if he knew he was about to die, and that decedent replied that he did. He says then: "I told him I thought it was better for him to arrange his account, otherwise there would be litigation after his death." In the same connection he says: "I spoke to him, and reiterated again and again, and asked him what he would do, and how he intended to dispose of his property. He told me he would leave his property to his sister Bridget." A person who was present at this interview, and who signed the paper as a subscribing witness, says that before the decedent said he would leave his property to his sister the priest asked him if he had any relatives in this country, and that the decedent replied, none except his sister; and that the priest then asked to whom he intended to leave his property, and that decedent replied, to his sister. The priest then drew the paper called a will, and had the decedent put his mark to it. This statement shows how the paper came to be drawn and signed.

Undue influence consists in the destruction of free agency. Whatever constrains a person to do what is against his will,

and what he would not do if left to himself, is undue influence, no matter by what means the control is exercised. The extent or degree of the influence is wholly immaterial, for the test is, was the influence, whether powerful or slight, sufficient to destroy free agency, so as to make the act brought in judgment the act of another rather than the expression of the mind and heart of the actor? Undue influence exercised by any one, whether he or another gains by its exercise, renders the will or other instrument thus procured worthless. These principles are so well settled and familiar, and so obviously essential for the protection of those suffering from sickness or subject to the infirmities of old age, as to dispense with the citation of authority. Applying them to this case, it is clear that the paper under consideration is the product of undue influence. Left to himself, it is manifest that the decedent would have died intestate. He did not want to make a will. When he was first advised by his priest to make a will he refused, or deferred doing so until another time. His priest says he refused because he did not think he was dying. But now he is told he is about to die; he believed he was in the grasp of death; he is also told that it will be better for him to make a will, and that if he does not litigation will follow his death. These words came to him from his spiritual adviser, — from the man to whom he had committed the welfare of his soul, and in whom he reposed the highest and holiest trust that it is possible for one human being to repose in another. Spoken by such a person, at such a time, they were invested with all the coercive force that words can ever have. To the decedent their force was irresistible. They not only subdued and broke his will, but put his recollection in a state of chaos. They made him forget his grandchild, his brother, and his nephew. He said he had no relatives in this country except a sister. The words possessing the greatest force were false. The priest had no warrant whatever for declaring that if the decedent did not make a will there would be litigation after his death. No matter with what motive or for what purpose this declaration was made, there can be no doubt that, though entirely false, it operated as a powerful appeal to the fears of the decedent; and, coupled as it was with the advice of his priest that it was better for him to make a will, that it constrained him to do what he did not want to do, and what he would not have done if left to himself.

The decree of the orphans' court should be affirmed, with costs.

**WILLS — PRESUMPTION OF UNDUE INFLUENCE.** — When the person who draughts a will, or participates in procuring its provisions from the testator, occupies a relation of special confidence towards him, and would not be a beneficiary in the absence of the will, and is specially benefited by its terms, the presumption of undue influence arises, and the burden is upon him to show that the will was freely executed: *Richmond's Appeal*, 59 Conn. 226; 21 Am. St. Rep. 85, and extended note; note to *Garvin v. Williams*, 100 Am. Dec. 324. Where a confidential relation, such as principal and agent, existed between the beneficiary and the testator up to the latter's death, the presumption of undue influence arises, and requires affirmative proof to overcome it: *Lyons v. Campbell*, 88 Ala. 462.

**WILLS — UNDUE INFLUENCE — WHAT IS — EFFECT OF.** — The undue influence which will vitiate a will must be such as in some way destroys the free agency of the testator, and constrains him to do something against his will, which he is too weak to resist: *Waddington v. Buzby*, 45 N. J. Eq. 173; 14 Am. St. Rep. 706, and note; *Grove v. Spiker*, 72 Md. 300. To constitute undue influence, the testator must be so controlled by persuasion, pressure, or fraud as not to act voluntarily, but subject to the will and purposes of others: *Mitchell v. Mitchell*, 43 Minn. 73. Undue influence does not exist unless the free agency of the testator has been destroyed: *McOoon v. Allen*, 45 N. J. Eq. 708.

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## GUTCH v. FOSDICK.

[48 NEW JERSEY EQUITY, 358.]

**TRUST, ENFORCEMENT OF, IN EQUITY — STATUTE OF LIMITATIONS — DEMAND — LACHES.** — A court of equity has jurisdiction to enforce an express continuing trust created by a written instrument in these words: "I hereby certify that I hold in trust for Frances E. A. Gutch the sum of four thousand dollars, for which I agree to pay interest at five per cent per annum, and I promise to refund to her the said four thousand dollars on demand." And the fact that it may also be enforced at law will not oust the jurisdiction of equity. This certificate or declaration is not in effect a mere promissory note payable on demand, but a deposit in continuing trust until the *cestui que trust*, by her act in demanding payment, determines the trust. And where the bill to enforce this trust alleges that the actual demand for the restoration of the four thousand dollars was first made within six years before the commencement of the suit, since the suit would not have been barred by the statute of limitations if the money had been sued for at law, the statute will not be applied in equity. The complainant is not guilty of laches in not determining the trust during the lifetime of the trustee.

**BILL to enforce a trust.** The opinion states the case.

*Charles L. Carrick*, for the complainant.

*Cornelius B. Harvey and Gilbert Collins*, for the demurrant.

**The CHANCELLOR.** The bill alleges that between the years 1872 and 1877 the complainant, from time to time, deposited

with Jacob Erwin several sums of money, "in trust, to use or invest the same for her use and benefit, and subject to her order and control"; that in July, 1877, the money so deposited amounted to four thousand dollars, and then Erwin gave her a certificate or declaration, of which the following is a copy: —

"NEW YORK, July 3, 1877.

"I hereby certify that I hold in trust for Frances E. A. Gutch the sum of four thousand dollars, for which I agree to pay interest at five per cent per annum, and I promise to refund to her the said four thousand dollars on demand.

"\$4,000.

J. ERWIN."

That no part of the principal or interest has ever been paid; that Jacob Erwin used the moneys so deposited with him in the betterment of his estate; that he died intestate in November, 1889, possessed of real and personal property of large value, leaving the defendants as his heirs at law and next of kin, one of whom, Lizzie Fosdick, has been duly appointed administratrix of his estate; and that the complainant has lately demanded the amount of her deposit, with interest, from the administratrix, and has been refused payment.

It prays that by decree it may be determined that Jacob Erwin held the four thousand dollars in trust; that his estate is charged therewith; and that his heirs at law and administratrix shall pay it, with interest, out of his estate.

To this bill the defendant, Lizzie Fosdick, and her husband demur, assigning three grounds for their demurrer: 1. Want of equity; 2. That the complainant has a remedy at law; and 3. That recovery of the amount claimed is barred by the statute of limitations.

Upon this hearing the allegations of the bill are to be taken as true.

Here were a series of deposits with Jacob Erwin, in trust, upon an express understanding and agreement that they were to be kept and used for the complainant's benefit. The use to which Mr. Erwin actually put them was the improvement of his own property. Such an investment was not productive of a distinguishable income to the trust fund, because the value of that fund was intermingled with the value of Mr. Erwin's own property. Under the circumstances, he probably, upon an accounting, would be required to pay legal interest. It was under this condition of affairs that the certificate of July 3, 1877, was given and accepted. By it the trust was

distinctly declared, a rate of interest was agreed upon, and the means of determining the trust was provided. I fail to perceive how the existence of a trust can be seriously questioned. The allegations in the bill expressly charge it, and the certificate most plainly declares it in terms sufficiently certain to be completely executed.

There can be no question as to the jurisdiction of this court in the enforcement of this trust. It may be that it may also be enforced at law (1 Story's Eq. Jur., sec. 58), but the fact of the existence of such concurrent remedy does not oust the complainant of her right to proceed in equity: *Kane v. Bloodgood*, 7 Johns. Ch. 90; 11 Am. Dec. 417.

The third ground of demurrer was principally relied upon at the argument.

It was insisted for the demurrant that the declaration or certificate by Mr. Erwin must be treated as, in effect, a mere promissory note, payable on demand, which might have been sued upon at law; that in a suit at law, the statute of limitations might have been interposed as a bar to recovery, because it is settled in this state and elsewhere that a note, payable on demand, may be sued upon at its date without previous actual demand, and hence the right of action accrued at the date of the certificate (*Larason v. Lambert*, 12 N. J. L. 247), and that under such circumstances a court of equity will follow the law, apply the statute, and refuse the decree asked for.

If I assume the status of the declaration of trust to be as the demurrants insist, I must acquiesce in their conclusion. In the case of *Kane v. Bloodgood*, 7 Johns. Ch. 90, 11 Am. Dec. 417, Chancellor Kent said: "I cannot assent to the proposition that all cases of direct and express trust, and arising between trustee and *cestui que trust*, are to be withdrawn from the operation of the statute of limitation, notwithstanding a clear and certain remedy exists at law. The word 'trust' is often used in a very broad and comprehensive sense. Every deposit is a direct trust. Every person who receives money to be paid to another, or to be applied to a particular purpose to which he does not apply it, is a trustee, and may be sued either at law for money had and received, or in equity as a trustee for a breach of trust." From the examination of a large number of decisions the chancellor deduces this rule: "That the trusts intended by the courts of equity, not to be reached or affected by the statute of limitations, are those technical and

continuing trusts which are not at all cognizable at law, but fall within the proper, peculiar, and exclusive jurisdiction of this court."

This rule has been repeatedly adopted and approved in this state: *Marsh's Ex'rs v. Oliver's Ex'rs*, 14 N. J. Eq. 262; *McClane v. Shepherd*, 21 N. J. Eq. 76; *Partridge v. Wells*, 30 N. J. Eq. 176; affirmed on appeal, 31 N. J. Eq. 362; *Buckingham v. Ludlum*, 37 N. J. Eq. 145; *Kirkpatrick v. McElroy*, 41 N. J. Eq. 539.

In the case of *Partridge v. Wells*, 30 N. J. Eq. 176, Vice-Chancellor Van Fleet, after stating the rule, says: "The test, then, obviously prescribed by the rule is, had the suitor a remedy at law which he has lost? If the complainant in this case had a complete remedy at law which has been lost by lapse of time, he is not entitled to the remedy he seeks here."

Under the assumption that the certificate or declaration of trust is in effect a mere promissory note, payable with interest on demand, the case comes clearly within the test just quoted.

But is this certificate or declaration to be regarded as virtually a promissory note?

It is to be observed that by it Jacob Erwin declares that he holds four thousand dollars in trust, not that he owes that sum, and that he will refund it, not that he will pay it. The language is evidently selected with care, to fully and consistently express a deposit in trust, in contradistinction from a promised payment of a loan or indebtedness. The declarant does not owe, he holds in trust. Considered independently of the words "in trust," the word "hold" implies a defensive possession, entirely consistent with that of a trustee. The declarant is to pay interest while he thus holds, but he is not to pay the principal sum; that he is to refund. The word "pay," importing indebtedness, is applied only to the interest which springs from the use of the fund. When disposition of the fund itself is mentioned, the word "refund" is used in the sense of "restore." I fail to perceive how more apt words could be selected to express the idea of a pure deposit in trust. And besides, it is a continuing trust, for it contemplates a holding which will justify payment for the use of the fund. The certificate, then, does not stand upon the footing of a promissory note which treats of the payment of an indebtedness, but upon the footing of a deposit in continuing trust un-

til the *cestui que trust* shall by her act, in demanding payment, determine the trust.

Considerable contrariety of opinion exists in the courts of the several states as to whether a certificate of deposit, payable on demand, can be sued upon before demand has actually been made. I think that the better opinion is, that it cannot be sued upon before demand. I do not find any adjudication in this state upon this subject, and I regret that my time has not permitted me to exhaustively examine the decisions of our sister states as I could wish. That which I consider the better opinion prevails in New York: *Payne v. Gardiner*, 29 N. Y. 146; *Pardee v. Fish*, 60 N. Y. 265; 19 Am. Rep. 176; *Howell v. Adams*, 68 N. Y. 314; *Boughton v. Flint*, 74 N. Y. 476; *Munger v. Albany City Bank*, 85 N. Y. 580; *Smiley v. Fry*, 100 N. Y. 262; and in Pennsylvania: *Trick. Lim.*, sec. 224; Maryland: *Fells Point Savings Institution v. Weedon*, 18 Md. 320; 81 Am. Dec. 603; Vermont: *Bellows Falls Bank v. Rutland Co. Bank*, 40 Vt. 377; Minnesota: *Mitchell v. Easton*, 37 Minn. 335; and perhaps other states. Most respectable authorities, however, hold the other way: *Curran v. Witter*, 68 Wis. 16; *Brummagin v. Tallant*, 29 Cal. 503; 89 Am. Dec. 61; *Poorman v. Mills & Co.*, 35 Cal. 118; 95 Am. Dec. 90; *Tripp v. Curtenius*, 86 Mich. 496; 24 Am. Rep. 610; *Kilgore v. Bulkly*, 14 Conn. 362.

In recognizing the first cited of these authorities as holding the better opinion, I agree with Chief Justice Bronson in his remark in *Downes v. Phoenix Bank of Charlestown*, 6 Hill, 297, where he says: "I do not find that the point has ever been decided; but it may be that this is the first case where a man has sued his banker without first drawing on him for the money. We are reminded that where the promise is to pay on demand, the bringing of the action is a sufficient request. If that were a new question, I think the courts should not again fall into the absurdity of admitting that there must be a demand, and still holding that a suit may be commenced without any prior request. They would either say that no demand was necessary, or else that it was a condition precedent to the right of action. It is an anomaly in the law that the breach of the defendant's contract should be made out by the very fact of suing him upon it. In all other cases there must be a breach before suit brought. The rule ought not to be extended to cases which do not fall precisely within it."

By the allegations of the bill in this case, it distinctly ap-



pears that actual demand for the restoration of the four thousand dollars was first made within six years previous to the commencement of this suit. If the money had been sued for at law, the suit would not have been barred by the statute of limitations, hence that statute will not be applied here.

It is further insisted for the demurrant, that if the complainant's recovery is not barred by the statute of limitations, this court will, nevertheless, deny her relief, because of her unexplained laches in making demand and instituting her suit. I am not willing to adopt this course at this time. Here is an express continuing trust, presumably acquiesced in by both trustee and *cestui que trust* until the trustee died. The trust was apparently intended to be of indefinite duration for the benefit of the *cestui que trust*. How can it be said that she was guilty of laches in not determining it? I do not think that the bill exhibits laches upon her part. But upon this insistment the demurrer itself is defective, for it fails to point out that the bill is objected to for the reason that it shows the complainant to have been guilty of laches: *Van Houten v. Van Winkle*, 46 N. J. Eq. 380.

The demurrer will be overruled.

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**TRUSTS — ENFORCEMENT IN EQUITY.** — Trusts of personalty will be enforced by a court of chancery: *Kimball v. Morton*, 5 N. J. Eq. 26; 43 Am. Dec. 621. A court of equity alone can compel a trustee to execute or surrender his trust: *Guphill v. Isbell*, 1 Bail. 230; 19 Am. Dec. 675.

**EXPRESS TRUST — STATUTE OF LIMITATIONS.** — The statute of limitations does not begin to run in cases of express trusts until a repudiation of the trust: *Fox v. Fay*, 89 Cal. 339; 23 Am. St. Rep. 474, and note.

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## SHACKLETON v. SHACKLETON.

[48 NEW JERSEY EQUITY, 364.]

**DIVORCE — CONDONATION, WHAT AMOUNTS TO, AND HOW LIMITED.** — A wife by voluntarily having sexual intercourse with her husband, after she knows that he has committed adultery, and that she can prove it, thereby condones his offense. But condonation in such cases is always conditional and limited, and the party forgiven must, to retain the benefit of the pardon, treat the other in the future with conjugal kindness and fidelity; and as a general rule, the pardon extends only to such offenses as are known to the pardoning party when the intercourse occurs.

**CONDONATION BY WIFE NOT IMPLIED FROM SEXUAL INTERCOURSE WHEN —**  
The rule that condonation may be implied from sexual intercourse is not enforced so rigorously against a wife as it is against a husband, especially where she is entirely without means, and wholly dependent on him for everything. And where, at the time a wife permitted her husband to

have sexual intercourse with her, she did not know and could not prove, but merely believed upon suspicion, that he had committed adultery, it will not be presumed that she intended to condone his offense.

**BILL for divorce.** The opinion states the case.

*Garret Berry*, for the complainant.

*Alan H. Strong*, for the defendant.

**VAN FLEET, V. C.** This is a suit by a wife against her husband for divorce. The charge is adultery. The husband's guilt is proved. There is no difficulty on that score, but the case nevertheless presents a debatable question, and that is, whether all the wrongs on which the complainant's right of action rests have not been pardoned.

The parties were married in August, 1867. They have five children. They all live with their mother. The proofs show that the defendant induced another woman, by falsely representing himself to be a single man, to enter into a contract of marriage with him, in November, 1881, and that he and she, from that date on until April, 1889, lived together as husband and wife. During the same period the defendant also lived with the complainant as his wife. He, however, spent the greater part of his time with the other woman. His adulterous intercourse with her extended over a period of more than seven years. In April, 1889, this other woman brought a suit for divorce against the defendant, for adultery, in the superior court of the city of New York. He was then a citizen of this state, and notice of that suit was given to him by publication in a New York newspaper. The complainant saw that publication soon after it was made, and she admits that it led her to suppose that the defendant had lived with this woman as his wife. She did not see the defendant, after the publication came to her knowledge, until the twenty-ninth day of May following. She then accused him with having committed adultery with this woman. He assured her, with great earnestness, that the charge was false, and told her that if she would go with him to his lawyer and to one of his employers, he could satisfy her of his innocence. She says she told him that she believed him to be guilty, notwithstanding his protestations of innocence, and also that she would never forgive him. She admits that the truth is that she believed that he was guilty in spite of his denials. And she frankly confesses that she had sexual intercourse with him during the night of the day on which this conversation occurred. Her evidence shows that

it was voluntary. He went to bed first, she entered the same bed shortly afterward, and there the intercourse occurred. He left her the next morning, and did not return until after this suit was brought. The complainant's bill was filed June 7, 1889. The important question which this condition of facts raises is, Did the complainant, by allowing the defendant to have sexual intercourse with her on May 29th, condone all his adulteries?

The law is settled that a wife, by voluntarily having sexual intercourse with her husband, after she knows that he has committed adultery, and that she can prove it, thereby pardons his offense: 2 Bishop on Marriage and Divorce, sec. 43; *Quincy v. Quincy*, 10 N. H. 272, 274. Such act necessarily implies forgiveness. A husband by committing adultery violates one of the most sacred duties imposed upon him by the marriage contract, and by his wrong forfeits all his rights under the contract. By his infidelity he puts it in the power of his wife to have the bond which binds her to him dissolved; it is, therefore, entirely consonant with both reason and justice that if she freely consents to sexual intercourse after she has full knowledge of his guilt, her consent should operate as a pardon of his wrong. But condonation in such cases is always conditional and limited; the party forgiven must, to retain the benefit of the pardon, treat the other in the future with conjugal kindness and fidelity; and as a general rule, the pardon extends only to such offenses as are known to the pardoning party when the intercourse occurs. With regard to the limitation of this rule, Bishop says: "Alike in reason and in law, forgiveness cannot take place without a knowledge of the existence of the thing to be forgiven, so that such knowledge is one of the elements of every presumed condonation": 2 Bishop on Marriage and Divorce, sec. 38.

An instructive example of the manner in which this principle is applied is given in *Alexandre v. Alexandre*, L. R. 2 P. & D. 164. A husband brought a suit against his wife for divorce, on the ground of adultery. The parties were married in January, 1856, and lived together for a short time thereafter and then separated, and did not resume cohabitation until March, 1868. After resuming cohabitation they remained together for only a few weeks. The husband then brought his suit. While they were separated, the wife had a child by another man, — it was born in 1860, — and after the birth of the child, and before they resumed cohabitation, the wife com-

mitted other adulteries. While the negotiations looking to a restoration of conjugal relations were going on, the wife confessed the adultery which resulted in the birth of the child, but concealed those subsequently committed. The question was, whether the husband had not, by taking his wife back under the circumstances stated, condoned all her offenses; but the court held that the offenses committed subsequent to the birth of the child had not been condoned, because it could not be presumed that the husband had forgiven wrongs that he did not know had been committed. The doctrine that the pardon implied from sexual intercourse shall extend only to offenses known to the pardoning party when the intercourse occurs is no less a dictate of sound reason than of justice. Willingness to forgive a single offense, or even a series of offenses, committed under circumstances of strong temptation, would not give the least support to a presumption that the injured party, if he or she knew the whole truth, would forgive a long course of profligacy. Forgiveness may be so expressed, certainly by words, and possibly also by conduct without words, as to show that the injured party means to blot out the whole past and to forgive everything, both offenses known and unknown, but in no case should the court so adjudge, as against an injured wife, except the proofs show very clearly that such was her purpose. The question whether a matrimonial offense has been condoned or not is always one of intention; and where a wife is the injured party, and her husband claims the benefit of a pardon, and rests his claim on nothing but an implication arising out of her conduct, the court should be extremely careful not to absolve him from the consequences of a wrong which his wife never intended to forgive. It must be remembered that she is the weaker party, and always more or less under the influence of her husband, and that in many cases her chief means of inducing her husband to perform his duties towards her cheerfully and generously is by yielding to his wishes and trying to please him. A prudent wife, unless her husband is a craven, will always coax rather than attempt to coerce him. The rule that pardon may be applied from sexual intercourse is not enforced so rigorously against a wife as it is against a husband. The reasons why this is so are obvious. They were stated by Lord Stowell as follows: "A woman has not the same control over her husband, has not the same guard over his honor, has not the same means to enforce the observance of the matrimonial vow; his guilt is not of the same conse-

quence to her: *D'Aguilar v. D'Aguilar*, 3 Eng. Ecc. 329, 337; she is more *sub potestate*, more *inops consilii*; she may entertain more hopes of the recovery and reform of her husband; her honor is less injured and is more easily healed. . . . It is not improper that she should for a time show a patient forbearance. . . . Weakness in her is pardonable in many circumstances": *Beeby v. Beeby*, 3 Eng. Ecc. 338, 340. Notwithstanding the radical changes which during the last forty years have been made in the law respecting the property rights of married women, the husband is still, in many respects, the ruler, and his wife his subject. Her position is still one of obedience, and when she has no separate estate it is also one of dependence. That is the case here. The complainant, when the intercourse occurred which the defendant claims operated as a pardon, was entirely without means, and wholly dependent on the defendant for everything.

The principle above stated must control the decision in this case. And they make it clear, as I think, that the complainant is entitled to a decree. The legal effect of the sexual intercourse which she had with the defendant on May 29th was to condone only such offenses as she then knew he had committed. She did not then know that he had committed adultery. She says, it is true, that she believed he had, but her belief, it is manifest, was the product of suspicion, and not of evidence. Nothing up to that time had come to her knowledge, so far as the evidence shows, which was sufficient to have induced a loyal wife to believe that her husband had committed adultery. All she had heard up to that time was what the newspaper had told her. That was sufficient, undoubtedly, to excite her fears and create suspicion; but it was not evidence, nor even such information as should have induced her to start at once, and before she had given her husband an opportunity to defend himself, in pursuit of information against him.

It is the duty of a wife to be loyal to her husband; she must cling to him closer in adversity than in prosperity; believe in him when others doubt; stand by him when every other friend deserts him; defend him against all assailants; and she must be the last person to believe a report tending to disgrace or dishonor him. Knowledge of what the newspaper disclosed did not, in my judgment, impose upon the complainant the duty of going at once in search of evidence against her husband, and so making her chargeable with all the knowledge

that she might thus have acquired; on the contrary, I think it was her duty to desist from inquiry until she had given him an opportunity to defend himself. That was the course she pursued. The fact is, that when the complainant had the intercourse with the defendant, which he now attempts to use as a shield against the consequences of a life of profligacy extending over more than seven years, she could not prove that he had committed a single act of adultery; much less did she know that he had made the same solemn vows of love and loyalty to another woman that he had made to her. She had heard enough to make her suspect that he had been unfaithful to her, but it is entirely certain that she did not know either the extent or the atrocious character of his misconduct. To impute such knowledge to her by presumption would, as it seems to me, be contrary to the lowest notions of justice; the presumption should, according to both reason and justice, be the other way; for I think there can be no doubt whatever, that had the complainant known the whole truth on May 29th,—the full extent of the defendant's apostacy to her,—instead of going to the bed where he lay, and submitting to his embraces, she would have fled from him as a polluted being. The fact that she brought this suit within less than ten days after he turned his back upon her shows that she did not submit to his embraces because she was indifferent to her rights or insensible to injury. The complainant is entitled to a decree.

The defendant is also before the court on an order to show cause why he should not be adjudged guilty of contempt for disobeying an order requiring him to pay alimony. The proofs are not sufficient to support an order declaring that he has been guilty of willful disobedience, and the order to show cause must, therefore, be discharged.

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MARRIAGE AND DIVORCE — CONDONATION. — Where a wife dismisses a libel for divorce, and agrees to condone the husband's previous offenses, and to live with him if he will not commit further acts of adultery, and he does afterward commit adultery, such agreement and condonation will not bar the wife from suing for divorce for either the earlier or later acts of adultery; *Sewall v. Sewall*, 122 Mass. 156; 23 Am. Rep. 299. Condonation of injury by a husband or wife is always conditional, and has for its consideration the promise that the former injuries shall not be repeated, and that the forgiving party shall in future be treated with conjugal kindness; *Langdon v. Langdon*, 25 Vt. 678; 60 Am. Dec. 296, and note. See case of *Hofmire v. Hofmire*, 7 Paige, 60; 32 Am. Dec. 611.

**CASES**  
**IN THE**  
**COURT OF APPEALS**  
**OF**  
**NEW YORK.**

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**JOY v. DIEFENDORF.**

[180 NEW YORK, 6.]

**EVIDENCE — BURDEN OF PROOF. —** WHEN A NOTE has been obtained from the maker by practicing a fraud on him, one who seeks to recover thereon must assume the burden of proving that he is a *bona fide* purchaser.

**JURY TRIAL. — EVIDENCE OF A WITNESS MAY BE DISREGARDED,** though he is not contradicted, if he is a party or is interested, and therefore the court must submit to the jury the question of his credibility. Hence, where a plaintiff seeks to recover as a *bona fide* purchaser of a note which was obtained from the maker by fraud, and testifies to facts tending to show that he is such a holder, the question of his good faith cannot be withdrawn from the jury.

**USURY. —** A note is not void in the hands of a third person who has purchased it at a discount greater than the legal interest, unless the instrument had no inception between the parties, or was not intended to be available until discounted. Hence the rule is not applicable to a note induced by false representations, whereby the maker was procured to execute it in payment for the interest of a partner in an alleged business firm, under an agreement that the note was not to be sold or disposed of, but was to be paid out of the proceeds of the business.

*Z. S. Westerbrook*, for the appellant.

*Henry Bacon*, for the respondent.

**BROWN, J.** This action was brought to recover the amount claimed to be due upon a promissory note made by the defendant, whereby he promised to pay to H. D. Henderson or bearer one thousand dollars, with interest, six months after date, at the Spraker National Bank at Canajoharie, and by said Henderson transferred for value to the plaintiff within a few days after its execution.



The principal defense relied upon to defeat a recovery was, that the plaintiff was not a *bona fide* holder of the note.

The trial court directed a verdict for the plaintiff, thus disposing of this question as one of law, and refused a request by the defendant to submit it to the jury.

The evidence given upon the part of the defendant was sufficient to warrant the conclusion that the note had been obtained from him through a fraud practiced upon him by Henderson and Van Valkenburgh, and the burden was thus cast upon the plaintiff to show that he was a *bona fide* purchaser: *Voeburgh v. Diefendorf*, 119 N. Y. 857; 16 Am. St. Rep. 886, and cases cited.

This burden the plaintiff met by his own evidence as to the circumstances attending the purchase and his knowledge of the party from whom he obtained it, and the credibility of his testimony was for the jury to determine.

That question was decided in *Canajoharie Nat. Bank v. Diefendorf*, 123 N. Y. 191. That case was upon a note obtained by the same parties from this defendant, and grew out of the same transaction as the note in suit, and was transferred to the bank by Henderson.

The question of the good faith of the bank's purchase depended entirely upon the evidence of its cashier, and it was held that his relation to the bank and his interest in the transaction brought him within the rule that the credibility of a party or an interested witness is a question for the jury to determine. No distinction in this respect is apparent between that case and the one under consideration. The court, therefore, erred in refusing to submit the case to the jury, and the judgment must be reversed.

It was also claimed that the note was void for usury, in that, before it had any legal inception, it was transferred to the plaintiff at a discount much greater than the legal interest.

The question of usury was not raised at the trial in the Canajoharie bank case, and there was no ruling which presented it for consideration in this court, and we cannot, therefore, assume that the court decided it, although it was incidentally referred to in the opinion.

We think that defense is not available in this case.

The substance of the defendant's evidence was, that Henderson and Van Valkenburgh represented that they, with one Ackley, were engaged in business as partners; that they could buy out Ackley for eight thousand dollars; and by these and

other representations induced defendant to agree to become a member of the firm in Ackley's place, and to execute and deliver his notes to them for eight thousand dollars; that the notes were to be held by the firm, and were not to be sold or disposed of, and were to be paid out of the proceeds of the business.

Although these representations were false, it cannot be said that the notes had no legal inception.

They were intended to represent an obligation.

The rule which renders void a note in the hands of a third party, who has purchased at a discount greater than the legal interest, applies to instruments that have no inception between the parties, or which are not intended to be available until discounted. This note in suit does not fall within that rule.

The judgment must be reversed and a new trial granted, costs to abide the event.

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**NEGOTIABLE INSTRUMENTS — FRAUD — BURDEN OF PROOF.** — Proof of fraud in the inception of a bill of exchange casts upon the holder the burden of proving that he took it *bona fide* for a valuable consideration: *Harbison v. Bank*, 28 Ind. 133; 92 Am. Dec. 308, and note; *Davis v. Bartlett*, 12 Ohio St. 534; 80 Am. Dec. 375, and note. The burden of proof is upon the indorsee of a negotiable instrument which is shown to have been obtained from the maker by fraud, to show that he is a *bona fide* purchaser: *Vesburgh v. Diefendorf*, 119 N. Y. 357; 16 Am. St. Rep. 836, and note.

**USURY — DISCOUNT — BONA FIDE PURCHASER.** — A note sold at a greater discount than the legal rate of interest does not thereby become usurious if taken by the payee in a business transaction: *Ramsay v. Clark*, 4 Humph. 244; 40 Am. Dec. 645, and note; *Lloyd v. Keach*, 2 Conn. 175; 7 Am. Dec. 256, and note. The sale of negotiable paper at discount is not usurious, as between the vendor and vendee, where the former is the holder and apparent owner, and represents that the paper is business paper, though such representation is false, and the paper was made for the purpose of sale at usurious discount, if the vendee was a *bona fide* purchaser with no knowledge of such purpose: *Holmes v. Williams*, 10 Paige, 326; 40 Am. Dec. 250, and extended note.

## TILDEN v. GREEN.

[130 NEW YORK, 29.]

**A TRUST WITHOUT A BENEFICIARY** who can claim its enforcement is void, and this objection is not obviated by the existence in the trustees of a power to select a beneficiary, unless the claim of the persons in whose favor the power may be exercised has been designated with such certainty that the court can ascertain who were the objects of the power.

**CY-PRES.** — The equitable doctrine of *cy-pres* prevailing in the English court of chancery, and which was applied to gifts for charitable purposes when no beneficiary was named, has no place in the jurisprudence of New York.

**A DEVISE OR BEQUEST TO A CORPORATION TO BE CREATED** after the death of the testator will be upheld, if the corporation is called into being within the time allowed for the vesting of future estates. The gift may be treated as in the nature of an executory devise, dependent upon the incorporation of the institution contemplated by the will, and as vesting upon the occurrence of that event.

**DEVISE IN TRUST IS VOID FOR WANT OF DESIGNATED BENEFICIARY** when it devises property to trustees to be held for two lives in being, and requests the trustees to procure the passage of an act for an incorporation to be known as the "Tilden Trust," with capacity to establish and maintain a free library and reading-room in the city of New York, and to promote such scientific and educational objects as the trustees may more particularly designate, and authorizes them to convey such property to such corporation, when formed, but declares that in case it is not formed, or that, if from any cause or reason, they shall deem it inexpedient to convey to such corporation, then they are directed to apply it to the use of such charitable, educational, or scientific purposes as in their judgment will render such property most widely and substantially beneficial to the interests of mankind. This devise does not designate any beneficiary, but, on the contrary, leaves it to the discretion of the trustees whether or not they will convey or not to the corporation. Hence there is not, and cannot be, any person, natural or artificial, who is, or will become, entitled to the execution of the trust in his favor.

**TRUSTS, WILL CONTAINING LAWFUL AND UNLAWFUL.** — When some of the trusts of a will are legal and others illegal, if they are so connected as to constitute an entire scheme, so that the presumed wishes of the testator would be defeated if one portion was retained and other portions rejected, or if manifest injustice would result from such construction to the beneficiaries, or some of them, then all the trusts must be considered together, and all must be held illegal and must fall.

**WILLS. — IN CONSTRUING A WILL,** the court can only aid the testator's intent and purpose. It cannot devise a new scheme or make a new will.

**DEVISE IN TRUST VOID BECAUSE NO BENEFICIARY IS DESIGNATED** in the will cannot be made valid by the designation of a beneficiary by the trustees, in pursuance of a discretion vested in them by the will.

**TRUST POWER,** to be valid in the state of New York, must designate some person or a class of persons, other than the grantee of the power, as its objects, and it must be exercised for the sole benefit of such designated beneficiary, and its execution must be compellable in equity. A non-enforceable trust power is an impossibility under our laws, unless, by the

instrument creating it, it is expressly made to depend for its execution on the will of the grantee.

**WILLS.** — FOR THE PURPOSE OF ASCERTAINING THE TESTATOR'S INTENTION, the whole will must be considered, including the provisions admitted to be void.

**TRUSTS.** — AN ENFORCEABLE TRUST is one in which some person or class of persons has a right to all or a part of a designated fund, and can demand its conveyance to them, and in case such demand is refused, may sue the trustees in a court of equity, and compel compliance with the demand.

*James C. Carter, Daniel G. Rollins, and George F. Comstock,*  
for the appellants.

*Joseph H. Choate, Smith M. Weed, William V. Rowe, Delos McCurdy, and Lyman D. Brewster,* for the respondent.

**BROWN, J.** Samuel J. Tilden died in August, 1886, leaving a last will and testament dated in April, 1884. He left surviving him, as his only next of kin and heirs at law, one sister, two nephews, one of whom is the plaintiff in this action, and four nieces.

The defendants, Bigelow, Green, and Smith, were by the will appointed the executors thereof, and trustees of the trusts therein created, and the will having been duly admitted to probate in October, 1886, they immediately qualified and entered upon the discharge of their duties as such.

This action was brought to obtain a construction of the will. By the complaint, the thirty-third, thirty-fourth, and thirty-fifth articles were assailed as being invalid, but upon the trial no question was raised as to the two first named, and no determination in respect thereto was made.

The supreme court held that the effect of the thirty-fifth and thirty-ninth articles of the will was to create one general trust for charitable purposes, embracing the entire residuary estate, and vested in the trustees a discretion with respect to the disposition of such estate by them; that the testator did not intend to and did not confer upon any person or persons any enforceable right to any portion of said residuary estate, and did not designate any beneficiary who was or would be entitled to demand the execution of the trust in his or its behalf, and declared the provision of the will relating to the disposal of the residuary estate, for such reasons, illegal and void.

It is essential to a proper understanding of the will to read the two articles above named together, and they are here quoted, the last being placed first.

**“Thirty-ninth.** I hereby devise and bequeath to my said executors and trustees, and to their successors in the trust hereby created, and to the survivors or survivor of them, all the rest, residue, and remainder of all the property, real and personal, of whatever name or nature, and wheresoever situated, of which I may be seised or possessed, or to which I may be entitled at the time of my decease, which may remain after instituting the several trusts for the benefit of specific persons; and after making provision for the specific bequests and objects as herein directed, to have and to hold the same unto my said executors and trustees, and to their successors in the trust hereby created, and the survivors or survivor of them in trust, to possess, hold, manage, and take care of the same during a period not exceeding two lives in being; that is to say, the lives of my niece Ruby S. Tilden, and my grand-niece Susie Whittlesey, and until the decease of the survivor of the said two persons, and after deducting all necessary and proper expenses, to apply the same and the proceeds thereof to the objects and purposes mentioned in this my will.”

**“Thirty-fifth.** I request my said executors and trustees to obtain, as speedily as possible, from the legislature an act of incorporation of an institution to be known as the ‘Tilden Trust,’ with capacity to establish and maintain a free library and reading-room in the city of New York, and to promote such scientific and educational objects as my said executors and trustees may more particularly designate. Such corporation shall have not less than five trustees, with power to fill vacancies in their number; and in case said institution shall be incorporated in a form and manner satisfactory to my said executors and trustees during the lifetime of the survivor of the two lives in being upon which the trust of my general estate herein created is limited, to wit, the lives of Ruby S. Tilden and Susie Whittlesey, I hereby authorize my said executors and trustees to organize the said corporation, designate the first trustees thereof, and to convey or apply to the use of the same the rest, residue, and remainder of all my real and personal estate not specifically disposed of by this instrument, or so much thereof as they may deem expedient, but subject, nevertheless, to the special trusts herein directed to be constituted for particular persons, and to the obligations to make and keep good the said special trusts, provided that the said corporation shall be authorized by law to assume the obligations. But in case such institution shall not be so incorpo-

rated during the lifetime of the survivor of the said Ruby S. Tilden and Susie Whittlesey, or if for any cause or reason my said executors and trustees shall deem it inexpedient to convey the said rest, residue, and remainder, or any part thereof, or to apply the same or any part thereof to said institution, I authorize my said executors and trustees to apply the rest, residue, and remainder of my property, real and personal, after making good the said special trusts herein directed to be constituted, or such portion thereof as they may not deem it expedient to apply to its use, to such charitable, educational, and scientific purposes as in the judgment of my said executors and trustees will render the said rest, residue, and remainder of my property most widely and substantially beneficial to the interests of mankind."

On March 26, 1887, subsequent to the commencement of this action, the legislature passed an act incorporating the Tilden Trust, and authorizing it to establish and maintain a free library and reading-room in the city of New York. The institution was organized, and the executors and trustees made to it a conveyance of the residuary estate, and the conveyance was formally accepted by the trustees thereof.

The law is settled in this state that a certain designated beneficiary is essential to the creation of a valid trust.

The remark of Judge Wright in *Levy v. Levy*, 33 N. Y. 107, that "if there is a single postulate of the common law established by an unbroken line of decisions, it is, that a trust without a certain beneficiary who can claim its enforcement is void," has been repeated and reiterated by recent decisions of this court: *Prichard v. Thompson*, 95 N. Y. 76; 47 Am. Rep. 9; *Holland v. Alcock*, 108 N. Y. 812; 2 Am. St. Rep. 420; *Read v. Williams*, 125 N. Y. 560; 21 Am. St. Rep. 748; and the objection is not obviated by the existence of a power in the trustees to select a beneficiary, unless the class of persons in whose favor the power may be exercised has been designated by the testator with such certainty that the court can ascertain who were the objects of the power.

The equitable rule that prevailed in the English court of chancery, known as the *cy-pres* doctrine, and which was applied to uphold gifts for charitable purposes when no beneficiary was named, has no place in the jurisprudence of this state: *Holmes v. Mead*, 52 N. Y. 336; *Holland v. Alcock*, 108 N. Y. 812; 2 Am. St. Rep. 420.

If the Tilden Trust is but one of the beneficiaries which the

trustees may select as an object of the testator's bounty, then it is clear and conceded by the appellants that the power conferred by the will upon the executors is void for indefiniteness and uncertainty in objects and purposes. The range of selection is unlimited. It is not confined to charitable institutions of this state or of the United States, but embraces the whole world. Nothing could be more indefinite or uncertain, and broader and more unlimited power could not be conferred, than to apply the estate to "such charitable, educational, and scientific purposes as in the judgment of my executors will render said residue of my property most widely and substantially beneficial to mankind."

"A charitable use, where neither law or public policy forbids, may be applied to almost anything that tends to promote the well-doing and well-being of social man": Perry on Trusts, sec. 687.

Unless, therefore, within the rules which control courts in the construction of wills, we can separate the provision in reference to the Tilden Trust from the general direction as to the disposition of the testator's residuary estate, contained in the last clause of the thirty-fifth article, and find therein that a preferential right to some or all of such estate is given to that institution when incorporated, and one which the court at the suit of said institution could enforce within the two lives which limit the trust, we must, within the principle of the cases cited, declare such provisions of the will invalid, and affirm the judgment of the supreme court. The appellants claim that the power conferred upon the executors to endow the Tilden Trust may be upheld, independent of the invalidity of the power given to apply the estate to such charities as would most widely benefit mankind.

The proposition is, that by the thirty-fifth article the testator made two distinct alternative provisions for the disposition of his residuary estate, — one primary, for the incorporation and endowment of the Tilden Trust; the other ulterior, and to be effectual only in case the executors deemed it inexpedient to apply the residue to that corporation; and it is claimed that this provision of the will constitutes a trust to be executed for the benefit of the Tilden Trust, or confers upon the trustees a power in trust, or that it constitutes a gift in the nature of an executory devise.

The latter proposition rests upon the assumption that there is by the will a primary gift, complete and perfect in itself, to



the Tilden Trust, that vests the title in that corporation immediately upon its creation.

That a valid devise or bequest may be limited to a corporation to be created after the death of the testator, provided it is called into being within the time allowed for the vesting of future estates, is not denied: Perry on Trusts, p. 872, sec. 738.

That question was decided in *Inglis v. Trustees of the Sailors' Snug Harbour*, 3 Pet. 99, and in *Burrill v. Boardman*, 48 N. Y. 254; 3 Am. Rep. 694.

In those cases, the gift was treated as in the nature of an executory devise, dependent upon the incorporation of the institution contemplated by the will, and which would vest upon the occurrence of that event.

But in view of the language of the will before us, that proposition cannot be maintained here.

By an executory devise, a freehold was limited to commence in the future, and needed no particular estate to support it. It arose upon the happening of a specified event, and the fee descended to the heir at law until the contingency happened. By our Revised Statutes, executory devises are abolished, and expectant estates are substituted in their place, and such estates, when the contingency happens upon which they are limited, vest by force of the instrument creating them, and this right in the expectant cannot be defeated by any person. But the testator here intended not to create such an estate. The Tilden Trust takes nothing by virtue of the will. The residuary estate is vested in the trustees, or intended to be, and it is solely by their action that it is to become vested in the Tilden Trust.

It is only in case that the executors deem it expedient so to do that they are to convey the whole or any part of the residue to the Tilden Trust. Whether that corporation should take anything rested wholly in the discretion of the executors, as the expediency or in expediency of an act is always a matter of pure discretion: 2 Perry on Trusts, secs. 506, 507.

Every expression used in the will indicates the bestowal of complete discretionary power to convey or not to convey, and the creation and bestowal of such a power in the executors is wholly opposed to and fatal to the existence of an executory devise.

In this respect the case differs from those cited.

In *Inglis v. Sailors' Snug Harbour*, 3 Pet. 99, there was no trust created, no discretion vested in the executor, no convey-

ance to be made after the testator's death. His intention to give his property to a corporation to be created to carry out his charitable purpose was clear. Such was the fact also in *Burrill v. Boardman*, 43 N. Y. 254; 3 Am. Rep. 694.

By the will in that case, the property was given directly to the corporation which the testator contemplated should be created after his death. No trust was created, and no discretion was bestowed upon the executors to determine whether the corporation should or should not have it.

Once created, the property by force of the will vested in the corporation. The only similarity between that case and this is, that the trustees there, as here, were directed to apply to the legislature for an act of incorporation. In case the legislature refused to grant a liberal charter, then the trustees were directed to pay over the estate to the government of the United States.

But no discretion was given to the executors to determine upon any event whether or not the corporation once created should take the property.

"Nothing," said Chief Justice Church, "can be more certain than that the testator designed that the title to the funds or property in the possession of the trustees or elsewhere, which was included in the residuary clause, should vest in the corporation immediately upon its creation. . . . An application was to be made to the legislature, after the testator's death, for a charter. If obtained, the bequest would take effect; if not, it would go to the ulterior donee. . . . If the corporation applied for and granted should not be liberal and in accordance with the provisions of the will, the ulterior donee or next of kin could challenge its right to take the bequest. It would then become a judicial question." So, clearly, no question in that case was left to the judgment of the trustees. They were not to determine even whether the charter was a liberal one. That was a question for the court that would have been decided in any contest over the property between the corporation and the next of kin or ulterior donee. A discretionary power in executors or trustees was not, therefore, an element in the *Burrill* case. Not so here. Here we have the unlimited authority delegated to the executors to withhold the entire property from the corporation if they choose so to do. There the corporation once created was vested immediately by force of the will with the title to the property. Here, although the corporation may be created in a form and

manner satisfactory to the trustees, it takes nothing, unless the executors, considering every cause and reason, deem it expedient to convey to it some or all of the residuary estate.

In the Burrill case the testator made a direct gift to a designated beneficiary, the Roosevelt Hospital. In this case Mr. Tilden gave nothing to the Tilden Trust, but simply authorized his executors to endow it, if, in their judgment and discretion, they should deem it expedient. Moreover, after creating numerous special trusts, and setting apart portions of his real estate for such several special trust funds, the testator, by the thirty-ninth article of the will, gives the whole of the residuary estate to his executors, in trust, for the purposes mentioned in the thirty-fifth article, bestowing upon them, so far as language could do so, the title to all the property to be held and possessed during the lives of his niece Ruby S. Tilden, and his grandniece Susie Whittlesey, and which he denominated the "general trust" of his estate. He clearly intended by this provision to create an active trust in his whole residuary estate, and to give to his executors a discretionary power to give such part of it as they deemed expedient to the Tilden Trust, or to withhold all from it. Having intended to convey, so far as he was able to do, the title to his whole estate to trustees, nothing was left that could be the subject of a gift to the Tilden Trust.

We come, therefore, to the consideration of the question whether the thirty-fifth article can be upheld as constituting a separate trust or power in trust for the benefit of the Tilden Trust.

The affirmative of this question can be maintained only by considering the direction to convey to the Tilden Trust as a power separate by itself and distinct and independent from the power to convey to such charitable purposes as in the judgment of the trustees would be most widely and substantially beneficial to mankind.

The latter provision is eliminated from the will altogether by the appellants, and then the instrument is construed as if the eliminated provision had never existed.

The appellants invoke the aid of the principle, that where several trusts are created by a will which are independent of each other, and each complete in itself, some of which are lawful and others unlawful, and which may be separated from each other, the illegal trusts may be cut off and the legal ones permitted to stand.

This rule is of frequent application in the construction of wills, but it can be applied only in aid and assistance of the manifest intent of the testator, and never where it would lead to a result contrary to the purpose of the will, or work injustice among the beneficiaries, or defeat the testator's scheme for the disposal of his property.

The rule as applied in all reported cases recognizes this limitation, that when some of the trusts in a will are legal and some illegal, if they are so connected together as to constitute an entire scheme, so that the presumed wishes of the testator would be defeated if one portion was retained and other portions rejected, or if manifest injustice would result from such construction to the beneficiaries, or some of them, then all the trusts must be construed together, and all must be held illegal and must fall: *Manice v. Manice*, 43 N. Y. 303; *Van Schuyver v. Mulford*, 59 N. Y. 426; *Knox v. Jones*, 47 N. Y. 389; *Benedict v. Webb*, 98 N. Y. 460; *Kennedy v. Hoy*, 105 N. Y. 135.

The cases cited fairly illustrate the practical application of this rule by the courts.

In *Knox v. Jones*, 47 N. Y. 389, the testator created one trust to receive and pay over the income of his estate to his brother for his life and then to his sisters, with cross-limitations over as between them, remainder to the children of his sister Georgiana, and in default of children to Columbia College. This court held the whole trust invalid, and refused to sustain the provision in behalf of the testator's brother, on the ground that there was but a single trust which provided for all the beneficiaries, and that they were all embraced in a common purpose; that the several provisions of a single trust could not be severed, and those that violated the statute against perpetuities dropped and the others sustained. In *Van Schuyver v. Mulford*, 59 N. Y. 426, a gift to the testator's wife of the rents and income and profits of the estate during life was upheld and declared to be valid, although the devise over might be void on the ground that the gift to the wife was separate and distinct from the other provision of the will, and had no effect beyond her life, or upon the ultimate disposition of the estate.

In *Benedict v. Webb*, 98 N. Y. 460, the testator created separate trusts in two thirds of his estate for the benefit of his four children. Three of the trusts were held to be valid and one invalid, on the ground that the trust term transgressed the statute. But the court refused to sustain the valid trusts, on the ground that to do so would defeat the intention of the

testator in the disposition of his property, and work injustice among the beneficiaries, by permitting three of the children to take under their respective trusts, and also as heirs at law in the one fourth as to which the trust was declared invalid.

The result of these and all other cases is, that in applying the rule invoked by the appellants, which permits unlawful trusts to be eliminated from the will, and those that are lawful to be enforced, we must not violate the intention of the testator, or destroy the scheme that he has created for the disposition of his property.

We may enforce and effectuate his will and give full effect to his intent, provided it does not violate any cardinal rule of law, but we cannot make a new will, or build up a scheme for the purpose of carrying out what might be thought was or would be in accordance with his wishes.

At the threshold of every suit for the construction of a will lies the rule that the court must give such construction to its provisions as will effectuate the general intent of the testator as expressed in the whole instrument. It may transpose words and phrases, and read its provisions in an order different from that in which they appear in the instrument, insert or leave out provisions if necessary, but only in aid of the testator's intent and purpose, — never to devise a new scheme or to make a new will.

The fact that the executors of the will applied to the legislature and procured the incorporation of the Tilden Trust in a form and manner satisfactory to themselves, and have deemed it expedient to convey to it the whole residuary estate, and have executed a conveyance thereof, is not a matter for consideration in this connection. This point was considered in *Holland v. Alcock*, 108 N. Y. 312, 2 Am. St. Rep. 420, and in *Read v. Williams*, 125 N. Y. 560, 21 Am. St. Rep. 748; and it was held that the validity of the power depended upon its nature, and not on its execution. In the latter case, the testator bequeathed the residue of his estate "to such charitable institutions, and in such proportion, as my executors, by and with the advice of my friend Rev. John Hall, D. D., shall choose and designate." And prior to the commencement of the action, the executors, with the advice of Dr. Hall, made a written choice and designation of certain incorporated institutions existing under the laws of this state, among whom they directed the residuary estate to be divided. The fact of selection was not deemed material, and the will was declared invalid.

**The rights of heirs and next of kin exist under the statutes of descent and distribution, and vest immediately upon the death of the testator.**

**If the trust or power attempted to be created by the will, or the disposition therein made, is valid, their rights are subject to it, but if invalid, they immediately become entitled to the property. Hence the existence of a valid trust is essential to one claiming as trustee to withhold the property from the heir or next of kin. What a trustee or donee of a power may do becomes, therefore, immaterial. What he does must be done under a valid power, or the act is unlawful. If the power exercised is unauthorized, the act is of no force or validity. In such case there is no trust or power. There is nothing but an unauthorized act, ineffectual for any purpose.**

**It is not deemed material to the decision of the question now under consideration whether the provisions of the will relating to the residuary estate are regarded as constituting a trust or a power in trust, except so far as that fact may be indicative of the testator's intention.**

**If there was a trust, then the executors took title to the residuary estate, but if there is created a valid power in trust, it will be executed with substantially the same effect as if the will created a trust estate. But section 58 of the statute of uses and trusts, which declares that when an express trust is created for any purpose not enumerated in the foregoing sections, no estate shall vest in the trustees, but the trust, if directing the performance of an act which may be lawfully performed under a power, should be valid as a power in trust, is not, of course, susceptible of the construction that a trust invalid, because in conflict with some cardinal rule of law could be upheld as a power.**

**Every trust necessarily includes a power. There is always something to be done to the trust property, and the trustee is empowered to do it; and if the trust is invalid because the power to dispose of the property is not one that the law recognizes, it cannot be upheld as a power in trust. The rules applicable to the execution of trusts in this respect are equally applicable to the execution of powers; and as it is of no particular importance in this case in whom the title to the residuary estate is vested, it is not material to the decision whether the provisions of the will are examined as a trust or as a power in trust. The purpose of the trust is lawful, and personal property, which constitutes the greater part of the testator's**

estate, was a proper subject of the trust that the testator intended, and if it is invalid, it is because the power conferred on the trustees for the disposal of the estate is so uncertain and indefinite that its execution cannot be controlled or enforced by the courts.

In *Prichard v. Thompson*, 95 N. Y. 76, 47 Am. Rep. 9, the legal title to the fund was vested in the executors in trust. In *Read v. Williams*, 125 N. Y. 560, 21 Am. St. Rep. 748, the executors were given a power in trust. But the court said there was in that respect no legal distinction, and the power in the latter, as the trust in the former, case was declared invalid.

But the nature of the estate which the testator intended to convey to his trustees, and the nature of the power intended to be delegated to them, is of importance in ascertaining his intent, and determining what was the scheme that he had for the disposal of his property. By our Revised Statutes (vol. 1, p. 783), powers as they existed by the common law were abolished, and thereafter their creation, construction, and execution were to be governed by statute. They are classified as general and special, beneficial and in trust. A beneficial power is one that has for its object the grantee of the power, and is executed solely for his benefit: Sec. 79. Trust powers, on the other hand, have for their object persons other than the grantee, and are executed solely for the benefit of such other persons: Secs. 94, 95. Trust powers are imperative, and their performance may be compelled in equity, unless their execution or non-execution is made expressly to depend on the will of the grantee: Sec. 96. And a trust power does not cease to be imperative where the grantee of the power has the right of selection among a class of objects: Sec. 97. And sections 100 and 101 make provision for the execution by a court of equity of trust powers where the trustee dies, or where the testator has created a valid power, but has omitted to designate a person to execute it. A trust power, to be valid, therefore, must designate some person or class of persons, other than the grantee of the power, as its objects, and it must be exercised for the sole benefit of such designated beneficiary, and its execution may be compelled in equity. A non-enforceable trust power is an impossibility under our law, unless, by the instrument creating it, it is expressly made to depend for its execution on the will of the grantee.

In every case where the trust is valid as a power, the lands to which the trust relates remain in or descend to the persons



otherwise entitled, subject to the execution of the trust as a power: 1 Rev. Stats., p. 729, sec. 59.

Before applying these rules to the case before us, our duty is to ascertain the testator's intent from an inspection of the will, and for this purpose we must read the whole instrument, including the provisions admitted to be void. Those provisions, though ineffectual to dispose of the property, cannot be obliterated when examining it for the purpose of ascertaining the testator's intention: *Van Kleeck v. Dutch Church*, 20 Wend. 457; *Kiah v. Grenier*, 56 N. Y. 220.

The prominent fact in the testator's will is, that he intended to give his property to charity. He intended that none of his heirs or next of kin should take any of it, except such as he gave to them through the several special trusts that he created for their benefit. He emphasized this purpose in the last article of his will by providing that any of them who should institute or share in any proceeding to oppose the probate of the will, or to impeach, impair, or to set aside or invalidate any of its provisions, should be excluded from any participation in the estate, and the portion to which he or she might otherwise be entitled to under its provisions should be devoted to such charitable purposes as his executors should designate. To the accomplishment of this purpose, he intended to create a trust, and doubtless believed that he created a valid one. He created numerous trusts for the benefit of his relatives and for the creation of other libraries and reading-rooms. These he denominated "special trusts." In the thirty-ninth article he devised and bequeathed to his executors, and "to their successors in the trust hereby created, and to the survivor and survivors of them," all the rest and residue of his property, "to have and to hold the same unto my said executors and trustees, and to their successors in the trust hereby created, . . . . to possess, hold, and manage the same" during the lives of his niece Ruby S. Tilden, and his grandniece Susie Whittlesey, and "to apply the same and the proceeds thereof to the objects and purposes mentioned in this my will." He gave to his executors the power to collect the income of the whole estate, that which was set apart in the special trusts, and that constituting the trust of the residuary estate. The trust of the residuary estate he denominated the "general trust"; and in the twenty-sixth article he gives direction as to the disposition of the surplus income "during the continuance of the trust of my general estate."

It is clear, therefore, that the testator intended to create a trust of his residuary estate, and in plain, unequivocal language he indicated his purpose to be that the trustees should be vested with the title to the property until they should divest themselves of it in carrying out the purposes mentioned in the will, and which are to be found in the thirty-fifth article. Turning to this article, the important feature is, that the power there given to the trustees, and the only power that could absolutely effectuate the testator's intent to devote his property to charity, was an imperative one.

There is no discretion to be exercised upon the question whether the property shall go to charitable purposes. There is no act involving that disposition of the property the execution of which is made to depend on the will of the trustees.

Discretion there is as to the objects of the charity, but none as to the general disposition of the estate. If the Tilden Trust is incorporated in a form and manner satisfactory to the trustees, they are authorized to convey to that institution the whole residue, or so much thereof as they shall deem expedient, and if for any cause or reason they deem it inexpedient to endow that institution with the whole or any part of the residue, then to apply the same or such part as they do not apply to the use of the Tilden Trust to such charitable purposes as they shall deem most widely beneficial to mankind.

The object and purpose in this scheme of the testator is, therefore, a devotion of his estate to charity.

But it is said that the Tilden Trust represents an intention different from and alternative to the gift to the charitable, educational, and scientific purposes mentioned in the last clause of the article; that the authority to endow it that is vested in the trustees is a primary power, and the power to devote the estate to the other undefined purposes is ulterior; that while the latter is imperative in its character, the former is discretionary wholly, and depends for its execution upon the will of the trustees, and that each power stands alone, separate and distinct from the other, and the power to endow the Tilden Trust is likened to a power of appointment.

Powers of appointment are so common in testamentary dispositions of property that no citation of authority is necessary to show their validity.

Their execution may depend solely upon the will of the donee of the power, and they are recognized as valid by the ninety-sixth section of the statute already quoted. "I give to

**A such portion of my residuary estate as B shall, within the lifetime of the survivor of C and D, designate and appoint,"** which is the case suggested on the brief, is undoubtedly a good testamentary bequest, and is a good illustration of a naked power of appointment, the execution of which depends on the will of B, and is not enforceable at the suit of A.

In such a case, the title to the property descends to the heirs or next of kin, or passes under the will to the ulterior donee, subject to the execution of the power.

But there is no similarity between the suggested bequest and the will before us. Follow that bequest by a gift over to charitable uses, or let it stand alone in the will, and you have in one case alternative gifts, and in the other alternative purposes.

There is a preference expressed or implied by the testator as to the purpose to which his estate shall go, and the objects that shall be benefited.

In the one case the choice lies between the individual legatee and the heirs, in the other between the legatee and a disposition to charity.

But in the will before us there is no alternative purpose. There is a single scheme, a gift to charitable uses, and the suggestion of the Tilden Trust indicates no intent in the testator's mind contrary to the intention to devote the estate to charity, and in this respect the will before us is distinguished from the case suggested by the learned counsel for the appellants of a power to convey the estate to a designated individual at a stated age, and in the event of the donee of the power deeming it inexpedient so to do, then a gift over to undefined charitable uses.

There the primary purpose of the testator is a gift to the designated legatee, and not to charity. And the intent to give the estate to charitable uses is secondary, and limited upon the determination of the trustee not to make the primary gift. Such a will plainly indicates alternative purposes and contains alternative powers. The two gifts are in no respect connected, and if the gift over is void, the first may stand, and if executed, represents the will of the testator.

But in the thirty-fifth article of the will under consideration there is no antithesis, so far as the purpose to which the property is to be devoted is concerned. It expresses a single intent only, viz., to devote the estate to charitable uses; and while, of course, in such a scheme the testator might prefer

and designate one corporation over another as the object of his bounty, I shall attempt to show that in this case he has not done that, and has not conferred any preferential right to the estate or any part of it upon the Tilden Trust.

What is the Tilden Trust? and how does it stand in the testator's scheme?

It may fairly be assumed that the testator, having determined to devote his estate to charity, understood that his object could be accomplished only through the instrumentality of a corporate body.

He requested his trustees to cause the Tilden Trust to be incorporated. It was to have the power to establish and maintain a free library and reading-room in the city of New York, and "to promote such scientific and educational objects" as the executors and trustees should designate. The latter power is precisely what the trustees are authorized to do by the so-called ulterior provision, viz., to apply the estate to such "educational and scientific purposes" as they should judge would be most beneficial to mankind.

Here, therefore, we have an authority to do the same thing in each provision of the will, and as the latter could only be worked out through the medium of a corporation, the so-called two powers are the same. So as to the free library and reading-room. That is plainly within the scientific and educational purposes of the second provision of the will, and could be maintained only through a corporate body. The suggested capacities of the Tilden Trust are therefore precisely the same as the so-called ulterior purposes, and each are expressive of the testator's scheme, so far as he had formulated it in his own mind. The Tilden Trust, therefore, plainly does not represent any alternative or primary purpose in the disposition of the estate, but is simply the suggested instrument to execute the testator's scheme for the disposition of property. Now, what did the testator intend the trustees should consider when they came to the determination of the expediency or in expediency of endowing that institution? The argument is, that they could not consider the ulterior purposes at all until they had disposed of the question whether it was expedient to convey to the Tilden Trust all or a part of the residuary estate.

But that is saying that they should determine that question without reference to the substance of the gift, and the object and purposes which the testator had in view. For, as I have already shown, the capacities and powers of the Tilden Trust—

**in other words, its purposes and objects, or rather the purposes and objects which the testator intended to effectuate through its instrumentality—are precisely the same as the so-called ulterior purposes, and as the latter must be carried out through the instrumentality of a corporation, the only distinction between the two is in the name of corporation that is to administer the fund. The question of expediency, therefore, resolves itself into a question whether the trustees should select the Tilden Trust or some other corporation through which to carry out the purposes of the will. Now, how could the trustees, charged with the imperative duty of devoting the estate to charitable and educational purposes, consider the question whether they should endow the Tilden Trust without taking a complete view of the whole field of charity?**

**They were bound to do so if they fairly attempted to carry out the testator's plan.**

**Take the question of the free library and reading-room. There is no duty or obligation imposed upon them in that respect. They are not bound to create or endow one. They are free to select any other educational object. So with locality. Can it be seriously claimed that there is any duty resting on them to establish a library in the city of New York? Is not the capital of the state or of the United States open to their choice of location, if they think a library located there would be more widely beneficial to mankind? Clearly, it appears to me that it was within the scope of the discretion committed to the trustees to determine whether a free library or reading-room should be established at all, and whether that or any other charitable or educational institution that they might select should be located in the city of New York, and that their determination of such question would be among the causes or reasons which might lead them to decide that it was inexpedient to endow the Tilden Trust, and that the testator intended that when the trustees should consider the Tilden Trust, they should consider their power with reference to the disposal of the estate, and the fact that if they did not endow that institution, they could still execute his wishes by applying it to such charitable, educational, and scientific purposes as they should select.**

**In other words, that if they did not give it to the institution that he suggested, and which would bear his name, they could give it to others, and still execute his will and carry out his general purpose for the disposal of his estate; and this power**

mean comparison of all charitable and educational objects, and selection from among them.

In substance, he said to his executors: I have determined to devote my estate to charitable, educational, and scientific purposes; I have formed no detailed plan how that purpose can be executed, but under the law of New York it must be done through and by means of a corporation. I request you to cause to be incorporated an institution to be called the Tilden Trust, with capacity to maintain a free library and reading-room in the city of New York, and such other educational and scientific objects as you shall designate; and if you deem it expedient, — that is, if you think it advisable and the fit and proper thing to do — convey to that institution all or such part of my residuary estate as you choose; and if you do not think that course advisable, then apply it to such charitable, educational, and scientific purposes as in your judgment will most substantially benefit mankind. Thus was left to the trustees the power to dispose of the estate within the limits defined, and to select the objects that should be benefited; and it is impossible to read the thirty-fifth article and find therein any preference in the way of a separate gift or power to the Tilden Trust, or to separate that institution from the testator's plan to devote his estate to charity. The trustees are free to select the Tilden Trust, and cause it to be incorporated, or to choose any existing corporation as the instrument to carry out the testator's scheme. Again, no event is named upon the happening of which any estate is limited to the Tilden Trust. The only condition suggested is the determination by the trustees of the question whether they deem it expedient to endow that institution. But if the views already expressed are correct, if the Tilden Trust is but one of many instruments through which the testator's charitable purposes may be executed, or is but a suggested beneficiary under the power, then the determination of the question of expediency involves the doing of the very thing which the law condemns, viz., a selection from an undefined and unlimited class of objects, and the power would be void.

It thus becomes apparent how important is the so-called ulterior provision in the plan which the testator had for the disposal of his estate; and effect cannot be given to that plan if that provision is stricken from the will, as it expressly defines the scope of the discretion committed to the trustees.

Strike out that provision, and instead of a discretion in the

trustees limited to the selection of the objects that should be benefited by the will, their power would be confined to the endowment of the Tilden Trust, and if they choose not to act, or failed to act, the estate would go to the heirs at law. Indeed, the legal effect of the will would be in that case to vest the title to the estate in the heirs, subject to the execution of the power to endow the Tilden Trust.

But if the provision of the will makes one thing particularly clear, it is, that the testator intended his estate to be devoted to charitable purposes, and should in no event go to his heirs, and he did not intend that his trustees should have the power to choose between his heirs and the Tilden Trust.

We cannot, therefore, obliterate the so-called ulterior provision and give effect to the scheme of the will.

The discretion plainly conferred on the trustees in the delegation of the power to determine the expediency or inexpediency of endowing the Tilden Trust would be thereby destroyed, and the trustees would be compelled to convey the estate to that institution, or by permitting the heirs to retain it, thwart the expressed wish of the testator.

Again, the appellants argue that the power to endow the Tilden Trust is one depending for its execution on the will of the trustees, and is not imperative, and hence not subject to the test whether it can be enforced in a court of equity. This argument is, perhaps, fairly answered when the conclusion is reached that the ulterior purpose cannot be stricken from the will, and that the thirty-fifth article represents but one scheme and one purpose for the disposal of the estate.

But it will be apparent in the view here taken that the testator did not intend that any power conferred upon his trustees should depend for its execution upon their will. Of course, in every power where the trustees have the right to select any and exclude others, there is necessarily involved discretion, and the final choice does in one sense rest upon the will of the trustee, but not as that term is used in the statute. The power conferred is the authority to convey the estate. That is imperative. The discretion committed to the trustee was to select the particular object. The choice depends on the trustees' will, but the act of choosing is imperative, else the power could not be executed. It is the result alone, therefore, that depends on the will of the trustees, and not the performance of the act of selection. A power is defined to be "an authority to do some act . . . which the one granting or re-



serving such power might himself lawfully perform": 1 Rev. Stats., p. 732, sec. 74. Section 58 provides that if the unauthorized trust there mentioned directs the "performance of any act" which may be lawfully performed under a power, it shall be valid as a power in trust.

Now, the acts authorized by the testator were those of selection and conveyance. The result of selection depended on the will of the trustees, whether they should choose one corporation or another, but the performance of the act of selection was just as obligatory as the duty to convey. The testator intended both should be performed, and the trustees could no more refuse or neglect one than the other. It follows from the views here expressed that the authority to endow the Tilden Trust, if that should be deemed expedient by the trustees, was not a separate power, distinct from the purpose to devote the estate to charitable uses, but was incidental to the testator's scheme, and involved therein.

While we may admit that the testator expressed a preference for a corporation that should bear his name, he conferred no right upon that institution. The purpose to which the estate should be applied he determined and designated, but the persons who should be benefited by the will, and the particular institution that should administer the fund, was left to the selection of the trustees. The expression of a preference conferred no right so long as the final choice was left to the trustees.

It was simply a suggestion which they might or might not adopt, and imposed no duty upon them, and in no way limited or fettered their action: *Lawrence v. Cooks*, 104 N. Y. 682; 2 Pomeroy's Eq. Jur., sec. 1016, note.

We are of the opinion, therefore, that the thirty-fifth article of the will does not confer separate powers upon the trustees, and that the so-called ulterior provision cannot be eliminated from the will without destroying the scheme that the testator designed for the disposal of his estate; that the whole article represents one entire and inseparable charitable scheme, and cannot be subdivided, and the power conferred on the trustees is one of selection.

This power was, under the statute, special and in trust. Under the sections heretofore quoted, such a power is imperative, and imposes a duty on the grantee, the performance of which may be compelled in equity for the benefit of the parties interested, unless its execution or non-execution is made ex-

pressly to depend on the will of the grantee, and it does not cease to be imperative where the grantee has the right to select any and exclude others of the persons designated as the objects of the power.

The power conferred by the will, not being made to depend for its execution on the will of the trustees, was, therefore, imperative, but it is not valid unless it can be enforced by the courts at the suit of some beneficiary.

As the selection of the objects of the trust was delegated absolutely to the trustees, there is no person or corporation who could demand any part of the estate, or maintain an action to compel the trustees to execute the power in their favor. This is the fatal defect in the will. The will of the trustees is made controlling, and not the will of the testator.

As was said by the learned presiding justice of the general term: "The radical vice of the entire provision seems to have arisen from the testator's unwillingness to confer any enforceable rights upon any qualified person or body."

Under the statute of powers, there may be a power of selection and exclusion with regard to designated objects, and the duty there imposed is made imperative and enforceable by the court.

But the statute presupposes that a power of selection must be so defined in respect to the objects that there are persons who can come into court and say that they are embraced within the class, and demand the enforcement of the power: *Read v. Williams*, 125 N. Y. 569; 21 Am. St. Rep. 748.

The views which Judge Van Brunt expressed in that case on that point at general term received direct approval in this court. He said: "It is conceded that the power contained in the clause in question comes under the head of a special power in trust as defined in the Revised Statutes, but it is said such a power is to be distinguished from a trust"; that the words "in trust" are used for purposes of classification only. We think, however, that to render a power in trust valid, the same certainty as to beneficiary must exist as in the case of a trust: 27 N. Y. St. Rep. 507.

These views find full confirmation in the provision of the statute, to the effect that if the trustee dies leaving the power unexecuted, a court of equity will decree its execution for the benefit equally of all persons designated; and if the testator fails to designate the person by whom the power is to be executed, its execution devolves upon the court (secs. 100, 101),

thus providing a scheme which prevents the failure of a testator's purpose when its subject is certain and its objects designated.

But in this case execution of the power could not be decreed by the court in either of the cases specified in the statute.

By an enforceable trust is meant one in which some person or class of persons have a right to all or a part of a designated fund, and can demand its conveyance to them, and in case such demand is refused, may sue the trustee in a court of equity and compel compliance with the demand.

In this case the testator devolved upon his executors the duty of selecting the beneficiary, and there is no person who has the right to enforce that duty, or demand any part of the estate in case the executors refuse or neglect to act.

The power attempted to be vested in the trustees cannot be controlled or enforced, and whether the provisions of the will relating to the residuary estate be regarded as creating a trust or power in trust, they are in either case void.

The judgment should be affirmed.

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BRADLEY, J., expressed his dissent in a lengthy opinion, concurred in by Potter and Vann, JJ., in which, however, he agreed with a majority of the court in the greater number of the legal principles stated in the prevailing opinion. He conceded that the doctrine of *cy-pres* did not prevail in New York; that a trust depending upon the selection by the trustees or executors of the charitable, educational, or scientific purposes to which its funds should be devoted was void; and therefore that the general direction given by the testator as to the disposition to be made of his property in the event that the Tilden Trust should not be incorporated, or in the event that his trustees should see proper, after its incorporation, not to convey to it all or some portion of his property, was void. But he insisted that if the property for any cause should not be conveyed to the trust, then that it would vest in the heirs of the testator as though he had died intestate; and he hence contended that the legal effect of the will was to provide that the trustees should procure the incorporation of the trust if they could do so within the lives mentioned in the will, and that they should organize the corporation and appoint its trustees and should convey to it the property in their hands, unless, for some good reason, they deemed it inexpedient to do so. He conceded that the corporation, even when formed and duly organized, would not be in a condition to compel the execution of a conveyance by the trustees, but he insisted, nevertheless, that the provision for the Tilden Trust must be treated "as primary and distinct from that for general charities"; and considering the provision for that trust as a primary one, he thought that the fact that the trustees might have withheld the property from the corporation not conclusive of the invalidity of the trust scheme, for the reason that "there may be future contingencies provided for upon which gifts are made to depend, and beneficiaries may not be definitely known or ascertained at the time of the testator's death. It is sufficient that they are so described as to be ascer-

tained in the future when the right accrues to receive the gift: *Holmes v. Mead*, 52 N. Y. 332; *Shipman v. Rollins*, 98 N. Y. 311. And a devise or bequest may be limited to a corporation not in existence at the time of the death of the testator, provided it is created within the time allowed for the vesting of future estates: *Inglis v. Sailors' Snug Harbour*, 3 Pet. 99; *Ould v. Washington Hospital*, 95 U. S. 303; *Burrill v. Boardman*, 43 N. Y. 254; 3 Am. Rep. 694; *Shipman v. Rollins*, 98 N. Y. 328."

Though he admitted that the trustees had a discretion to convey the property to the corporation or not, the learned judge thought the trust devolved upon them was imperative, and that "while a valid trust is imperative, attending it may be powers upon which limitations and executory bequests may be contingent, and the exercise of those powers may be discretionary": *Hawley v. James*, 5 Paige, 318; 16 Wend. 61, 176; *Mason v. Jones*, 4 Sand. Ch. 623; 13 Barb. 461; *Oostabadie v. Oostabadie*, 6 Hare, 410; *French v. Davidson*, 3 Madd. 396; *Walker v. Walker*, 5 Madd. 424; *Cole v. Wade*, 16 Ves. 27.

In support of his views that the directions concerning the dispositions of a testator's property to be made in the event that his trustees should not convey to the Tilden Trust could be disregarded, and the directions for the trust carried out as if they stood alone, and that the discretion vested in the trustees was not conclusive against the validity of a trust, Judge Bradley further said: —

"It is very likely that if the testator had apprehended the invalidity of the ulterior provision of the thirty-fifth article he would have provided a different limitation in the event there mentioned. But it cannot be assumed that the primary provision for the appointment and disposition of the residuary estate to the Tilden Trust would have been other than that which he made. The efficiency of the power given by this provision is not dependent upon the character of the ultimate limitation, nor is it less effectual than it would have been if that had been to a lawful object of testamentary gift. The difference is, that in the one case it was within the power of the trustees to defeat the disposition by the will of the residuary estate, and in the other they could not. But in the latter case, they, by the execution of the discretionary power, could have rendered the ultimate provision ineffectual, and for the purposes of the disposition of the fund inoperative. And therefore, unless the contingency arose upon which the ultimate limitation of it was dependant, it would not be important for any practical purpose whether it was valid or not, and in that event only would an enforceable character of the trust or trust power be essential to effectuate the intent of the testator. His purpose, it must be assumed in view of the power given, would be accomplished by the disposition to the incorporated institution designated by him. The creation of this power in nature and purpose was lawful, and through its execution the gift to the Tilden Trust could legitimately be effected, although, in respect to the appointment to that institution, it was made dependant upon the will of the executors and trustees. While it is essential to a trust as such that it be imperative, and therefore enforceable by decree in equity when the time arrives for its execution, it is not so of a mere power, or necessarily so of a trust power, although the latter is imperative unless its execution or non-execution is made expressly to depend upon the will of the grantee or donee. The testator intended to make the execution of the power, of appointment to the Tilden Trust dependent upon the will of the trustees, as expressly appears by the provision creating it. The contention, therefore, that this power of the primary provision was invalid, because its execution was not judicially enforceable in equity on behalf of

that institution, does not, in the view taken, seem to be maintained. The imperative character intended by the testator to be made applicable, and in a certain event to be applied to the disposition of the residuary estate, had relation to the ultimate limitation, which was dependent upon the contingency that the trustees should deem it inexpedient to appoint to the Tilden Trust any or only a portion of such fund. And as such limitation was invalid for indefiniteness and uncertainty in its object, the testator failed by it to effectually make any imperative provision for the disposition of the residuary estate by means of a trust, power in trust, or trust power enforceable as such, except so far as should be necessary to make and keep good the special trusts as directed.

"And as the will furnished no support for an ultimate limitation of the fund in the event the trustees should have deemed the execution of the power of appointment to the Tilden Trust inexpedient, the real property within the residuary estate descended to the heirs of the testator, subject to the execution of the power of appointment and disposition to that institution, and the right of his next of kin to the administration in their behalf of the personality of such estate was subject to the execution of the same power.

"Now, by reference again to the provisions of the thirty-fifth article, it may be seen, as plainly appears by their terms, that the testator intended that the trustees should exercise the power conferred upon them to consummate the disposition of the residuary estate for the declared purposes of the trust. If they were successful in their effort to obtain the corporate charter, it was their duty to determine whether it was satisfactory, and in the event it was so, then, unless they deemed it inexpedient to apply any part of the fund to the Tilden Trust, the further duty was imposed upon them to determine whether it should take all of it, and if not all, to appoint the amount of it so to be appropriated. It is apparent that the testator intended to make the exercise of such power a duty, and essentially so to carry out his declared purpose. The discretion which he evidently intended to give the trustees related, not to the execution of the power, but only to the manner of its execution. In that view (which seems well supported) may not the limitation to the Tilden Trust have been lawfully conditional, not only on its incorporation, but as well upon the manner such preliminary power, discretionary only in that respect, should be executed.

"In *Ould v. Washington Hospital*, 95 U. S. 203, the estate for the purposes of the trust was devised to trustees, with a view to the incorporation, after the death of the testator, of an institution to which they, in that event, were to convey the estate, provided the corporation was approved by them; otherwise not. The hospital was incorporated, and conveyance made to it by the trustees. The validity of the trust was contested, and the court held that the provision relating to a conveyance upon the creation of a corporation approved by the trustees was a conditional limitation of the estate vested in them. In that was involved the discretionary power of the trustees relating to the approval of the corporation. It is essential that the object and subject of a testamentary dispositional provision be definite, and when so designated, that they are or may become such, and properly be ascertained, a limitation may, by the testator, be made to depend upon a future condition having regard to the statute of perpetuities, and such condition may consist of a power resting in the discretion of a trustee provided for and defined by the will; and when the condition is fulfilled, the limitation may be enforced.

"The doctrine of the common law on the subject of powers of appointment and selection, except so far as it permitted the treatment of them as illusory,

is consistent with the statute relating to powers, which provides that 'a power is an authority to do some act in relation to lands, or the creation of estates therein, or of charges thereon, which the owner, granting or reserving such power, might himself lawfully perform': 1 Rev. Stats., p. 732, sec. 74. The powers now under consideration are a special power, and a special power in trust, which, as defined by the statute, are those where the persons or class of persons to whom the disposition of lands is to be made under the power are designated: Sec. 78; and '1. When the disposition which it authorizes is limited to be made to any person or class of persons other than the grantee of such power entitled to the proceeds, or any portion of the proceeds or other benefit to result from the execution of the power; 2. When any person or class of persons other than the grantee is designated as entitled to any benefit from the disposition or charge authorized by the power': Page 734, sec. 95.

"The provisions of the thirty-fifth article of the will, in terms, in view of those of the thirty-ninth article, created a special power in trust; and because the testator intended that his residuary estate should be disposed of as directed by his will, for the purposes of the trusts there mentioned, the provisions were apparently imperative; such, at all events, would have been their effect if the ulterior disposition to which the estate was conditionally limited had been valid.

"And the statute provides that 'every trust power, unless its execution or non-execution is made expressly to depend on the will of the grantee, is imperative and imposes a duty on the grantee, the performance of which may be compelled in equity, for the benefit of the parties interested': 1 Rev. Stats., p. 734, sec. 95. The ultimate limitation was by the terms of the will imperative in the event that the trustees failed for any cause to dispose of the fund under the primary one, which alone was made dependent upon their discretionary power. The Tilden Trust could take only through the power in the nature of that of appointment vested in the trustees; and the fact that the exercise of that power was discretionary, and could not be enforced, produced no legal infirmity in the provision relating to that institution, its ability to take, and to the limitation to it dependent upon such appointment: *Chatteris v. Young*, 6 Madd. 30; *Lancashire v. Lancashire*, 1 De Gex & S. 288; 2 Phill. 657; *Ools v. Wade*, 16 Ves. 27; *Perry on Trusts*, sec. 506; *Hill on Trustees*, 490-492.

"So far as the statute relates to the subject of the power of appointment, it provides that where under a power a disposition is directed to be made amongst several designated persons, without specification of the share to be allotted to each, all of them shall be entitled in equal proportion: 1 Rev. Stats., p. 734, sec. 98. But when the terms of the power import that the fund is to be distributed between them in such manner or proportions as the trustee may think proper, he may allot the whole to any one or more of such persons in exclusion of the other: Sec. 99. The trust power in such case does not cease to be imperative: Sec. 97. And if the trustee having such power shall die leaving it unexecuted, its execution shall be decreed in equity for the benefit equally of all the persons so designated: Sec. 100. These provisions of the statute are in that respect substantially declaratory of the common law: *Swift v. Gregson*, 1 Term Rep. 432. It was there, as it is by our statute, a trust power. And it is not important for the purposes of the question whether the designated persons are vested with the fund subject to the execution of the power, or take by reason of the power given. In the one case there is a gift expressed, and in the other implied, which will be exe-



outed by decree of the court in default of execution of the power by the donee of it: 1 Perry on Trusts, sec. 250; *Waleh v. Wallinger*, 2 Russ. & M. 78; *Lee v. Whiteley*, L. R. 2 Eq. 143.

"No such implication arises where there is a limitation over of the estate or fund to other objects in default of the execution of the power by the donee; and in that case the objects of the power take nothing as their beneficial interest, or the limitation to them is wholly dependent upon the execution of the power by him: *Davidson v. Proctor*, 19 L. J., N. S., Oh. 395; 14 Jur. 31; *Pearce v. Vincent*, 2 Mylne & K. 800; 2 Bing. N. C. 328; 2 Keen, 230; *Golding v. Inwood*, 3 Giff. 139. And although the power of appointment and selection rests in the discretion of the trustee, it is valid, and may be effectually executed by him: 2 Perry on Trusts, sec. 508; *Brown v. Higgs*, 5 Ves. 561.

"In the present case the provision relating to the Tilden Trust conferred upon the trustees a power of appointment and disposition to a definite object, with a limitation over on default of such appointment; and so far as by the terms of such provision the execution of the power was left to the judgment or discretion of the trustees, it was expressly made to depend on their will within the meaning of the statute. And as before remarked, the apparent purpose and effect of this provision was not qualified or defeated by the fact that the ultimate limitation was to objects so indefinite as to render it ineffectual. In practical effect it was the same as if the fund had been limited over to the heirs and next of kin of the testator, as they necessarily would take in default of the execution of the power.

"In *Power v. Cassidy*, 79 N. Y. 602, 35 Am. Rep. 550, the fund was bequeathed to the executors, with power of appointment and selection among a designated class of beneficiaries. While the manner of executing it was discretionary, the trust or trust power was imperative, and on default of the executors to execute it, the power would survive them, and the designated objects would then and ultimately be entitled to share equally in the fund, and it would be enforced accordingly. But as to those beneficiaries it would not, in that sense and for that purpose, have been imperative if there had been a limitation over to other objects on such default, although as to the latter it would have retained its imperative character. Yet the power thus given of appointment would have been valid, and may have been effectually executed.

"It is essential to the constitution of a valid trust or special power in trust, by a testator, that the objects be so designated or described that they may be definitely known or ascertained from the provisions of his will. And it was the failure of the testators to so designate or define the objects of the attempted trusts which came to the attention of the court, and were for that reason held invalid, in *Prichard v. Thompson*, 95 N. Y. 76; 47 Am. Rep. 9; *Holland v. Acock*, 108 N. Y. 312; 2 Am. St. Rep. 420; *Read v. Williams*, 125 N. Y. 560; 21 Am. St. Rep. 748. In those cases the trust power sought to be given was that of appointment and selection without limitation over. The infirmity which rendered invalid the provisions of the wills in question in those cases was, that no beneficiary was designated or pointed out by or ascertainable from the will having any interest in the execution of the power, or who could assert in court any claim founded upon the trust. Those provisions of the wills were therefore held invalid for indefiniteness of the classes of objects of the trusts sought to be created. And in this respect they were distinguished from *Power v. Cassidy*, 79 N. Y. 602; 35 Am. Rep. 550. The present case is distinguishable from them in like manner, and further, that the power given by the primary provision in question was not that of



appointment and selection among members of a class, but was of appointment and disposition to a definitely designated beneficiary. It is also essential that the subject of the power be designated and certain, or that the means be provided by the will to render it properly ascertainable or certain. The provision of the power in that respect is for the application to the Tilden Trust of the residue of the estate, or so much of it as the trustees should deem expedient. The cases before cited, recognizing an effectual discretionary power given to trustees to regulate, control, or determine the amount which certain beneficiaries should receive of specific funds, to be exercised in reference to circumstances which the donors of the power had in view, have some bearing upon this question. Those are the *Hawley*, *Mason*, *Costabadie*, *French*, *Walker*, and *Cole* cases, *supra*.

"The residuary estate was a definite fund, and unless the trustees determined that it was inexpedient to endow the Tilden Trust, they were at liberty to apply to it the entire fund, but whether expedient to so apply all or less than the whole of it was a matter of judgment of the trustees, to be founded upon the amount of the residue in reference to the sum suitably available for the purpose of the institution, and that was the amount the testator authorized the trustees to appoint to the institution. This was the means provided by the will to make certain that which until such action by the trustees was uncertain.

"In *Pock v. Haley*, 2 P. Wms. 387, it was held that a bequest by the testatrix of some of her best linen to A was void for uncertainty, but that a bequest of such of her best linen as the executor should think fit, or as the legatee should choose, would have been good.

"In *Kennedy v. Kennedy*, 10 Hare, 488, the testator gave all his household furniture, etc., to trustees, and directed that all his household property be sold by them, except such articles as his wife should desire to retain, and which he authorized her to appropriate to her own use. Held, that the power of selection was effectually given to the wife. And *Arthur v. Mackinnon*, L. R. 11 Ch. Div. 385, is to the same effect. It has been seen by reference to the statute that the power of appropriation of a fund among the members of a class may be created, and the donee of the power be authorized in his discretion to appropriate it in such proportions as he may please. This was so at common law. When the fund is definitely designated, it would seem that power may be conferred upon the donee of the power to determine what portion of it may be appointed to a definite beneficiary designated by the donor.

"Our attention has been called to no authority to the contrary of that proposition in its application to the present case. The *Prichard*, *Holland*, and *Read* cases do not have any necessary application to the question. The reasoning there was had in reference to their contexts, to which it was very apt. And the relief of the provision relating to the Tilden Trust, from the alternative ulterior provision which embraces only indefinite objects, denies to those cases any practical application to the questions presented in the case at bar.

"While the statute abolished powers as they before then existed (1 Rev. Stat., p. 732, sec. 73), it, as said by Judge Andrews in *Read v. Williams*, 125 N. Y. 560, 21 Am. St. Rep. 748, 'does not define all the purposes for which a power over property may be created.' This appears by section 74, before referred to, and by the revisers' notes (3 Rev. Stat., 2d ed., 590), as to powers other than those which are designated as beneficial. They, except as there enumerated, were abrogated by the statute: 1 Rev. Stat., p. 733, sec. 92. Treating that in question as a trust power, those considerations of the statute may not be essentially important here. It must

be assumed that the testator, through powers conferred on his trustees by the thirty-fifth article, intended to dispose of his entire residuary estate, and therefore its ultimate dispositional provision (in view of article 30) was intended, as by its terms it purported, to be imperative, but that character was not unconditionally applicable to the power of appointment and disposition in the primary provision relating to the Tilden Trust. It had relation to the limitation over to the objects of the ulterior provision, and in consequence of the invalidity of the latter, his intention, if the trustees had failed to appoint the Tilden Trust as the beneficiary, would have been disappointed. The purpose of the appointment and disposition to that institution is apparently legal, and at common law may have lawfully been accomplished through the execution of a power in the manner the testator sought by his will to do it. It also fairly comes within the purposes for which a power, as defined by the statute, may be employed: Sec. 74. At common law a trust may have been attended with a discretionary power, upon the non-execution of which the enforceable character of its ultimate limitation might be dependent. This relation of powers, to which trusts may have been subjected, was preserved and provided for by the statute. And while a trust power is in its nature imperative, that character of it, in the sense of being enforceable, may, when its execution or non-execution is made expressly to depend upon the will of the donee, be suspended by and during the existence of such discretionary power or determined by its execution. In the present case there was involved in the provision for the Tilden Trust a power in its terms discretionary, and so far as it was so, its execution or non-execution was made expressly to depend on the will of the trustees, and the purpose being lawful, it was valid, unless in contravention of the statute against perpetuities. It is urged that the limitation provided for by the thirty-fifth article of the will would permit the unlawful suspension of the absolute power of alienation of the realty and of the absolute ownership of the personal property constituting the residuary estate of the testator: 1 Rev. Stats., p. 723, sec. 15; p. 773, sec. 1. This would be so, and its effect the invalidity of the limitation, if such suspension would not, by the terms of the will, necessarily terminate within a period not longer than the continuance of the life of the survivor of the two persons there designated: *Schettler v. Smith*, 41 N. Y. 328. But the thirty-fifth article must be construed in connection with the thirty-ninth article, and by the latter the testator directed that the executors and trustees "possess, hold, manage, and take care" of the residuary estate during a period not exceeding such two lives. This, in view of the further direction that they apply such estate to the objects and purposes mentioned in the will, which was imperative, is not consistent with the suspension of the absolute power of alienation of the real estate, and of the absolute ownership of the personal property beyond that period. It therefore seems that the future estates sought to be created by the testator were so limited that by the terms of those provisions they would necessarily and beyond any contingency have terminated within the period prescribed for that purpose by the statute, and in that respect they may be upheld.

"These views lead to the conclusion that the provisions of the will relating to the Tilden Trust, and the powers for their execution given to the executors and trustees, were valid, and as the consequence, the main purpose of the action must fail.

"Since the commencement of the action, and upon the application of the executors and trustees, a Tilden Trust has been incorporated in form and manner satisfactory to them, and organized. They determined to endow it

with the entire residuary estate, and made to the institution conveyance and transfer accordingly, subject to provisions contingently made in the will by the testator in behalf of special trusts by him created and as there directed.

"It is insisted that the act of incorporation is not such as was intended by the testator, in that it was not given the corporate capacity designed by him. By the will he requested them to obtain 'an act of incorporation of an institution to be known as the Tilden Trust, with capacity to establish and maintain a free library and reading-room in the city of New York, and to promote such scientific and educational objects as my said executors and trustees may more particularly designate. Such corporation shall have not less than five trustees, with power to fill vacancies in their number, and in case said institution be incorporated, . . . I hereby authorize my said executors and trustees to organize the said corporation, designate the first trustees thereof,' etc. In the preamble of the act of incorporation it is stated that the 'executors and trustees deem it inexpedient to designate any purposes of the corporation . . . other than the establishment and maintenance of a free library and reading-room in the city of New York, in accordance with the purpose and intention of the said testator,' and such was the capacity given by the act to the corporation. The first section provided that the three persons (naming them) who were the executors and trustees, and such other persons as they should associate with themselves and their successors, were created a body corporate, under the name and title of the Tilden Trust; and by the second section it was provided that those three persons should be permanent trustees of such corporation, and that they designate and appoint other trustees, so that the number should not be less than five.

"The testator seems to have had in view only one definite purpose of the corporation. That he expressed. Beyond the establishment and maintenance a free library and reading-room, he contemplated that the promotion of some further scientific and educational objects might suitably and properly be added and sustained. He therefore provided that the corporate capacity be adapted to such objects in that respect as the executors and trustees should designate. This, however, would be dependent upon circumstances to be determined by them, and he left it to their discretion. He evidently did not intend that the corporation, for the purpose by him definitely appointed, should be frustrated by the failure of the executors and trustees to exercise their discretion in such manner as to give occasion to amplify the corporate capacity of the institution. The question whether, after the creation of the corporation for the free library and reading-room, the executors and trustees may, by the designation of such further objects, authorize the enlargement of its capacity accordingly, does not now arise and is not considered.

"We think the incorporation was not invalidated by the manner the capacity of the institution was defined in the act.

"When the plaintiff commenced this action, it may have had support in the invalidity of the ulterior provision of the thirty-fifth article of the will to prevent the application of any portion of the estate to the indefinite objects and purposes there mentioned. But as the executors and trustees afterwards made a determination which would prevent the application of any part of the fund to those objects and purposes, no relief in that respect is now essential, and the only purpose for which further consideration need be given to that subject has relation to the question of costs, which we think should, on behalf of the several parties, be chargeable to the estate of the testator.

"The judgments of the court below should therefore be reversed, and the

complaint dismissed, with costs in that and this court to all the parties, appellants and respondents, payable out of the estate."

**TRUSTS — BENEFICIARY NOT DESIGNATED.** — To create a valid trust, a defined beneficiary is essential, except in cases of certain "charitable" trusts: *Holland v. Alcock*, 108 N. Y. 312; 2 Am. St. Rep. 420, and note. A devise of the residue of the testator's property to such charitable institution, and in such proportions as his executors shall choose and designate, is void, because it substitutes for the will of the testator the will and discretion of the donees of the power; nor will their designation of certain beneficiaries render it valid: *Road v. Williams*, 125 N. Y. 500; 21 Am. St. Rep. 743, and extended note 755.

**TRUSTS — CY-PRES — VALIDITY OF DOCTRINE IN NEW YORK.** — The doctrine of *cy-pres* and the English law of charitable uses do not prevail in New York: *Holland v. Alcock*, 108 N. Y. 312; 2 Am. St. Rep. 420; *Beckman v. Benson*, 23 N. Y. 293; 30 Am. Dec. 262, and note.

**GIFT BY WILL TO NON-EXISTING CORPORATION — VALIDITY OF.** — A gift by will to a supposititious and non-existing corporation by name is not a public charity, and cannot be claimed by another unincorporated institution of a similar nature and nearly similar name, under the doctrine of *cy-pres*. This is true even though the donee was in existence at the date of the will, but ceased to exist before the testator's death: *Stratton v. Physio-Medical College*, 149 Mass. 505; 14 Am. St. Rep. 442, and note.

**DEVISE UPON TRUSTS, SOME OF WHICH ARE VALID AND OTHERS INVALID.** — Where there is a devise of property in trust, and some of the trusts are valid and others are not, the property vests in the trustees, to be applied to the valid trusts only: *Greene v. Greene*, 125 N. Y. 506; 21 Am. St. Rep. 743.

**WILLS — CONSTRUCTION OF — TESTATOR'S INTENT.** — In the interpretation of wills, the intention of the testator, if discoverable from his will, and lawful, is to be effected: *Greene v. Greene*, 125 N. Y. 506; 21 Am. St. Rep. 743, and note; *Nichols v. Bonnell*, 103 Mo. 151; *Estate of Cashman*, 134 Ill. 38; *McOutlock v. Valentine*, 24 Neb. 215. Where the language of a will is unambiguous, no intention of the testator is to be sought after but the one expressed: *Greenough v. Cass*, 64 N. H. 323.

**WILLS — HOW CONSTRUED.** — In construing a will, the construction should follow the intent collected from the whole will; and the general rules of construction must give way, where, in the consideration of the scheme of the will or of special provisions, their application in a particular case would defeat the intention: *Goebel v. Wolf*, 113 N. Y. 405; 10 Am. St. Rep. 464, and note; *Taubenham v. Dunn*, 125 Ill. 524. The intention of the testator must be gathered from all the parts of the will taken together: *Nichols v. Bonnell*, 103 Mo. 151; *Howe v. Barber*, 29 S. C. 466; *Wiggin v. Perkins*, 64 N. H. 36; *Kilgore v. Kilgore*, 127 Ind. 276. No clause of a will should be disregarded, but each must be considered in connection with the other provisions: *Estate of Cashman*, 134 Ill. 38.

**WILLIAMS v. WILLIAMS.**

[130 New York, 189.]

**DIVORCE** — **DESERTION** is the voluntary separation of one spouse from another without justification, and with an intention of not returning.

**DIVORCE** — **DESERTION BY A WIFE, CAUSED BY HER HUSBAND PROHIBITING** her from seeing or communicating with her mother, and his informing her that she could not go with him if she wanted to see or communicate with her mother, does not constitute any cause for divorce.

**DIVORCE ENTERED IN ANOTHER STATE** against a wife, who, at her marriage and ever afterwards, resided in this state, and who never appeared in the suit, is void as against her in this state, though she was personally served with process, but outside of the territorial jurisdiction of the court granting the divorce.

**ACTION** by a wife against her husband for divorce, on the ground that the defendant had abandoned her in August, 1882, and refused to permit her to return to him. The defendant alleged that the plaintiff abandoned him in 1880, and that he had been divorced from her by a judgment of a court of general jurisdiction in the state of Minnesota in January, 1884. Plaintiff and defendant were married in New York in 1879, and lived together as husband and wife until April, 1880, when the defendant, during preparations for removing from the house in which they had been residing, told plaintiff that if she went with him she must not see nor communicate with her mother. In August, 1882, defendant removed to Minnesota; and afterwards, in that state, sued plaintiff for a divorce. The summons in that suit was personally served on plaintiff in Pennsylvania while she was temporarily visiting in that state. The judgment in the Minnesota suit was excluded from evidence. The court found that the defendant had abandoned plaintiff in August, 1882, as alleged in her complaint, and therefore entered judgment in her favor.

*Frank H. Platt*, for the appellant.

*Austen G. Fox*, for the respondent.

**BROWN, J.** The chief ground upon which the appellant asks a reversal of the judgment in this action is, that the court erred in refusing to find as a conclusion of law that the plaintiff had abandoned him two years prior to his leaving this state and taking up his residence in Minnesota.

The evidence is substantially undisputed that the defendant refused to permit the plaintiff to live with him, unless she absolutely gave up all intercourse with her mother.

The parties were married in June, 1879, and lived together in a house in Fifty-ninth Street in New York, until the latter part of April, 1880, when the lease thereof expired. When preparing to remove from this house, the defendant's command to his wife was: "When you leave this house you are not to see your mother. . . . You shall not go where she is; you will have no communication with her; you shall not write to her, — have no communication with her whatever. If you want to see your mother you cannot go with me."

The condition thus imposed upon the plaintiff was never withdrawn, and under it she refused to live with the defendant.

The cause for this disagreement is not disclosed in the record, but the evidence amply justified the conclusion that the plaintiff was always willing to live with the defendant if he would permit her occasionally to visit her mother, and before he left the state she offered, unconditionally and in good faith, to return to him, and this he refused to permit her to do, but left New York and took up his residence in Minnesota, where he procured a decree of divorce against her.

Under these circumstances, it is clear that the defendant never had a cause of action in this state against the plaintiff for desertion. That term, as used in the law of divorce, contemplates a voluntary separation of one party from the other without justification, with the intention of not returning.

It could not be said in this case that the plaintiff's act in leaving her husband was voluntary. It was coerced by a harsh and unnatural condition, and she was at no time unwilling to return and live with him as his wife if that condition was withdrawn.

The evidence discloses nothing more than a temporary separation of the parties because of a disagreement. There was no desertion by either party, and neither, up to the time of the husband's refusal to receive the plaintiff, in the summer of 1882, had a cause of action against the other.

But upon the plaintiff's offer to return unconditionally, the defendant was without legal excuse in refusing to receive her. It is also claimed that it was error to refuse to admit in evidence the record of the Minnesota decree, and upon this point it is claimed that the rule heretofore prevailing in this state with reference to judgments of divorce rendered in other states against residents of this state, where there was no personal service of process within the state rendering the decree, and no personal appearance by the defendant in the action, has

been changed by recent decisions of the supreme court of the United States.

In support of this claim, we are referred by the appellant to *Maynard v. Hill*, 125 U. S. 190, and *Cheely v. Clayton*, 110 U. S. 701.

The latter case turned upon the construction of the statutes of the territory of Colorado relating to the service of a summons upon a non-resident, and following the decision of the highest court of the territory, the supreme court held the service in the case before it defective, and the decree void.

*Maynard v. Hill*, 125 U. S. 190, was an action in equity to charge the defendants as trustees of certain lands in Washington Territory, and to compel a conveyance thereof to the plaintiffs.

The case involved the legality of a legislative divorce granted by the legislature of the territory of Oregon, but the consideration of this question was, by the facts of the case, confined wholly to the territory within which the decree was granted. Neither case questioned the rule prevailing in this state, and the decree in *Maynard v. Hill*, 125 U. S. 190, goes no further than that a divorce granted without service upon or personal appearance of the defendant establishes the *status* of the parties to it within the state in which it was rendered. It does not overrule the decisions of this state, but it is in harmony with them, as it has never been denied by our courts that a state may adjudge the *status* of its citizens towards a non-resident, and that, so long as the operation of the judgment is kept within its own confines, other states must acquiesce: *People v. Baker*, 76 N. Y. 78-84; 32 Am. Rep. 274.

This subject had very full and careful consideration in the case cited, which was an extreme one, and until it is squarely overruled by a court of ultimate authority, must and will be regarded as settling the law in this state: *O'Dea v. O'Dea*, 101 N. Y. 23; *Jones v. Jones*, 108 N. Y. 415-424; 2 Am. St. Rep. 447; *De Meli v. De Meli*, 120 N. Y. 485-495; 17 Am. St. Rep. 652.

It is also claimed by the defendant that the Minnesota decree should have been admitted in evidence for the purpose of limiting the effect of the judgment in this state.

This argument is based upon the anticipation that the plaintiff may seek to enforce the judgment for alimony in the jurisdiction where the defendant resides, and upon the fact that the plaintiff had actual notice of the pendency of the Minnesota action.



The argument is fully answered in the case of *O'Dea v. O'Dea*, 101 N. Y. 23, and *Jones v. Jones*, 108 N. Y. 415-424; 2 Am. St. Rep. 447.

In the former case it appeared that the process of the Ohio court was actually delivered to the defendant, and she had notice of and was personally present at the taking of depositions on the part of the plaintiff in Toronto. This court held, however, that the Ohio court acquired no jurisdiction over her person, and that the decree was void.

In *Jones v. Jones*, 108 N. Y. 415-424, 2 Am. St. Rep. 447, a decree of divorce granted in Texas, where service was made out of the state, was held valid, on the sole ground that defendant appeared in the action and submitted herself to the jurisdiction of the court; but it was said in that case that "the marriage relation is not a *res* within the state of the party invoking the jurisdiction of a court to dissolve it, so as to authorize the court to bind the absent party, a citizen of another jurisdiction, by substituted service or actual notice of the proceeding given without the jurisdiction of the court where the proceeding is pending."

The decree granted in Minnesota, being void, was properly excluded. It could not be considered as having any effect upon the status of the plaintiff.

Being the wife of the defendant within this state, she must be considered as legally entitled to all the rights flowing from that relation under the constitution and laws of the state and of the United States, and if the result be to compel defendant in the jurisdiction where he now resides to comply with our decree, that is a right to which she is entitled under the constitution of the United States, and the courts of this state have no power to deny it to her.

The judgment should be affirmed.

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MARRIAGE AND DIVORCE — DESERTION — WHAT IS. — Desertion does not signify merely a refusal of matrimonial intercourse, but it imports a cessation of cohabitation, a refusal to live together, which involves an abnegation of all the duties resulting from the marriage contract: *Southwick v. Southwick*, 97 Mass. 327; 93 Am. Dec. 95, and note. Separation and intention to abandon must concur to constitute a ground for divorce: *Pinkard v. Pinkard*, 14 Tex. 356; 65 Am. Dec. 129, and note; note to *McVickar v. McVickar*, 19 Am. St. Rep. 433. Desertion is not of itself a ground of divorce until it continues for the full period fixed by law: *Newing v. Newing*, 45 N. J. Eq. 449.

MARRIAGE AND DIVORCE — JURISDICTION OF COURTS TO ENTER DIVORCES AGAINST NON-RESIDENT DEFENDANTS: See note to *Rigney v. Rigney*, 24 Am. St. Rep. 468.

**LAWYER v. FRITCHER.**

[130 NEW YORK, 230.]

**SERVICES — INTERFERING WITH RIGHT TO.** — He who unlawfully interferes with another's right to services, whether they be the services of a male or female, a minor or an adult, is liable for actual compensatory damages, in the manner and upon the same grounds that he would be liable for the unlawful interference with any other property right of another.

**PARENT AND CHILD. — A FATHER IS ENTITLED TO THE SERVICES OF HIS MINOR CHILD** residing in his family, and may therefore recover of any one who deprives him of those services, though the consent of the father was given, if such consent was procured by fraud.

**DAMAGES — PUNITIVE, FOR LOSS OF SERVICES OF CHILD.** — If a man, by representing himself to be unmarried, obtains the consent of the parents of a minor daughter to his marriage with her, and to her living with him, and he thereafter lives with her, declaring that she is his wife, until she, learning of his inability to contract marriage because of his having a wife from whom he had not been divorced, commits suicide, her father may sustain an action for the loss of the services of his daughter, and the jury may award him punitive damages.

*F. R. Gilbert*, for the appellant.

*William C. Lament*, for the respondent.

POTTER, J. This action was brought by plaintiff against defendant to recover damages, as alleged in the complaint, for the abduction of plaintiff's infant daughter from the service of the plaintiff, her father, and also for seduction while she was absent from her father's house. It appears that the defendant, who is a man sixty years of age, and has a wife from whom he is not legally divorced, and who is living absent from him, on the 6th of May, 1886, came to the plaintiff's house and had an interview with the plaintiff, as well as his daughter.

On the sixteenth day of May following, he again came to the plaintiff's house and had an interview with him and plaintiff's wife upon the subject of marrying Edith, plaintiff's daughter. During the interview with the plaintiff upon the latter day, upon the subject of the marriage of defendant to plaintiff's daughter, there was a conversation between them in regard to his legal right to contract marriage, and whether the conditions of separation of defendant from his wife were such as to allow of a valid marriage between defendant and plaintiff's daughter. The defendant represented that he had a legal right to marry, and the defendant drew a consent or contract to carry out such design, and induced the plaintiff and his wife to sign it. The consent or contract was in these words: —

*"To Home it May Concern: We the undersigned are the*

father and mother of the bearer Edith Lawyer, Whereas Edith and P. J. Fritcher of Sharon wish to be united we give our consent to their contracts.

"RICHMONDVILLE, May 16, 1886.

"PETER LAWYER.

"CATHERINE LAWYER."

Said Catherine Lawyer was not able to write her name, and Edith was requested to sign her name for her, and did so. After these representations were made and this instrument signed, the defendant carried Edith to Portlandville, in Otsego County, a distance of about thirty miles from her home and residence of plaintiff; staid at a public house at that place, and said to the lady who kept the house that he was married; occupied the same bed with Edith on the night of the seventeenth. The next day defendant carried Edith to Sharon, Schoharie County, where he resided, and stated to his housekeeper, who was a sister of Edith, that she was his wife. On the night of the 18th of May the defendant and Edith occupied the same room and the same bed. After Edith arrived there, and during the eighteenth and nineteenth days of May, there was a conversation between Edith and Julia, her sister, defendant's housekeeper, in which Julia told Edith that the defendant could not marry; that he had a wife living, and was not divorced from her.

Edith, the plaintiff's daughter, was about seventeen years of age, generally lived in her father's family, and performed service for him, though she did work out occasionally, but her father had received her wages.

Among the declarations made at the interview of the sixteenth between plaintiff and defendant, the plaintiff testifies that the defendant said: "I am just as clear from my wife as though I never had married her." The plaintiff also testified that he believed such statement to be true. This statement and belief preceded the signing of the paper above set forth.

On the seventeenth or eighteenth day of May, and after defendant had arrived at his home and made the statements above to Julia, she procured from a drug-store in the vicinity of defendant's residence some poison. Edith partook of that poison, and died of it on the twentieth day of May.

The principal question involved in this case is, whether the plaintiff proved a loss of service and damage in consequence thereof sufficient to maintain the action. The trial judge charged the jury that the plaintiff was not entitled to recover

damages for any loss of service by reason of the taking of the poison, and the death of Edith in consequence. Nevertheless, the jury, under the charge of the court, found a verdict in favor of the plaintiff, of eight hundred dollars, besides costs.

The general term was not unanimous in affirming the judgment on the verdict of the jury. One of the learned judges, as shown by his dissenting opinion, uses the following language, which indicates the view taken by him, and the grounds for his dissent from the affirmance of the judgment: "The defendant, a married man, over sixty years of age, took plaintiff's daughter Edith, about seventeen years old, from her father's house, on Monday, May 17th. He did this with the consent of the parents; but the verdict of the jury establishes that he obtained this consent by fraud. That night he staid with her at a hotel, and occupied the same bed with her, saying to the landlady that Edith was his wife. . . . The next day, after dinner, Edith became sick. She had taken poison. The day following, Thursday, the 20th, she died from the effects of the poison. Before death she told her sister that she took poison because she did not want to live, and that she did not want to see anybody. There was evidence that Edith had recovered from her usual monthly courses a week before she went away with defendant, and that before her death her underclothes were spotted with blood, which a physician supposed to be the menstrual flow. The important point in this case is, whether on these facts the court could properly submit to the jury the question whether the plaintiff sustained damage other than that of death for loss of service by reason of the seduction. It will be seen that there is no evidence of seduction before Monday night; no evidence of Edith's condition from Monday night till Wednesday noon, when she took the poison, and of course no evidence of pregnancy."

I should not feel justified in departing from my rule in this court not to write an opinion upon the affirmance of a judgment in a common and ordinary case, except to reconcile differences of opinions by the judges of the court below, and to remove any resort to strained or doubtful reasoning to sustain the judgment appealed from, by a brief presentation of a feature of the case that was not distinctly brought out in that court.

This action was brought to recover damages which the plaintiff alleged he has sustained by the unwarranted interference of the defendant with plaintiff's right to service. It

is as well settled that he who unlawfully interferes with another's right of service, whether it be the service of a male or female, a minor or an adult, is liable for actual or compensatory damages, in the same manner and upon the same grounds that he would be liable for an unlawful interference with any other property right of another.

The plaintiff alleges that he is the father of Edith Lawyer, that at the time of the acts of the defendant complained of by the plaintiff, she was seventeen years of age and was residing with the plaintiff, and that he was entitled to her services, and that without the consent of the plaintiff, the defendant, on or about the sixteenth day of May, 1886, enticed and persuaded the said Edith Lawyer to leave the residence and service of the plaintiff, and to accompany him (the defendant) to Portlandville, in the county of Otsego, etc.

The plaintiff also alleged that on the seventeenth day of May, 1886, the defendant debauched the said Edith, etc.

The evidence in this case establishes beyond question that on and previous to the sixteenth day of May, 1886, Edith was the servant of plaintiff, both in law and fact. It follows from that relation that plaintiff was entitled to command and to have her services wholly and without interruption, save such time as was necessary for her rest, health, and preservation, until the plaintiff should give a valid consent to dispense with the service or the law should terminate the relation.

The defendant came to plaintiff's house, where she was in fact performing and was in law bound to perform services for the plaintiff, and took her from and deprived the plaintiff of such service.

If this was done, as plaintiff alleges, without his consent, the defendant is liable to make plaintiff compensation for the loss of service. If the plaintiff's consent was obtained by defendant through fraud, it was void, for fraud vitiates all contracts and all consents. Consent or no consent was one of the issues to be tried by the jury, and the jury has found, upon competent evidence for that purpose, that any consent given by plaintiff was given through fraud, and so was no consent. With this finding by the jury the court cannot interfere. Edith was taken away from the plaintiff by the defendant and remained with him at a hotel, and on the way to defendant's home and at his home for the space of four days, and the plaintiff was in the mean time deprived of her services, and his right to them was unlawfully interfered with.

The *gravamen* of the action, and of all actions of this nature, is the loss of service; and both the pleadings and the proofs in this case make out a cause of action in entire harmony with the fullest requirements of such actions, and entirely dispense with any necessity or occasion to resort to fiction, as is said to be done in some instances to maintain the recovery of damages in these cases.

In the aspect we have been considering this case, it presents an actual and measurable pecuniary damage to the plaintiff. The loss of service constitutes the cause of action, and it can make no difference as to the right of action whether that has been accomplished by an unlawful persuasion of the servant to leave the master's employment, or through fraud upon the master or force upon the servant, or by both such fraud and force.

The loss of service is the cause of action, and when that is established, a basis for damages to some extent exists, and whether that loss is caused or attended or followed by sexual intercourse, defilement, or pregnancy, loss of health or disability to serve, or for the purpose or with the intention of obtaining those results through a formal but criminal marriage, has relation more especially to the damages the plaintiff may recover than to his cause of action.

It is true, the complaint charged debauchment and ill health as a consequence, as well as the taking of the servant from the master. Whether the debauchment was proven or not, the taking away by the defendant was proven without any contradiction, and this gave plaintiff a cause of action and a right to damages. In such cases, the jury have the right to impose punitive damages, in their discretion, in addition to compensatory damages.

I think these views are abundantly supported by numerous decided cases, to a few of which I make reference and extracts. Judge Andrews in *People v. De Leon*, 109 N. Y. 229, 4 Am. St. Rep. 444, says: "In *Regina v. Hopkins*, Car. & M. 254, the case of an indictment for the abduction of an unmarried girl under sixteen years of age, 'against the will' of her father, it appearing that the consent of the parents was induced by fraud, the indictment was sustained, and Gurney, B., said [in that case]: 'I mention these cases to show that the law has long considered fraud and violence to be the same.'"

In *Lips v. Eisenlerd*, 32 N. Y. 238 (which was an action by the father to recover damages for the seduction of his daughter,

who was twenty-nine years of age, but living in her father's family), this language is used: "And any illegal act by which the right of the father, such as it was, to her services was interfered with, to his detriment, was a legal wrong, for which the law affords redress."

On page 236 of the same case the court uses this language: "Finally, it is urged by defendant's counsel that only compensatory damages should have been allowed. The judge refused so to direct the jury, and I think he was right. The object of the action in theory is to recover compensation for the loss of the services of the person seduced. This is so far adhered to that there must be a loss of that kind or the action will fail; but when that point is established, the rule of damages is a departure from the system upon which the action is allowed. The loss of service is often merely nominal, though the damages which are recovered are very large. It is too late to complain of this as a departure from principle, for it has been the law of this state and of the English courts for a great many years."

The same court, further on in the opinion, uses this language: "The true rule [this being an action brought by plaintiff for the seduction of his daughter] I think is, that the plaintiff's right to the services may be made out in either way, and that when established so that the action is technically maintainable, the court and jury are to consider whether the plaintiff, on the record, is so connected with the party seduced as to be capable of receiving injury through her dishonor. A mere master, having no capacity to be injured beyond the pecuniary worth of the services lost, should undoubtedly be limited in his recovery to the value of these services. But the case of this plaintiff, as has been mentioned, is quite different."

In *Hewit v. Prime*, 21 Wend. 79, 81, 82, Judge Nelson, in delivering the opinion of the court in an action like the one under consideration, uses this language: "It is now fully settled, both in England and here (citing several authorities in both countries), that acts of service by the daughter are not necessary; it is enough if the parent has a right to command them, to sustain the action. . . . The ground of the action has often been considered technical, and the loss of service spoken of as a fiction, even before the courts ventured to place the action upon the mere right to claim the services; they



frequently admitted the most trifling and valueless acts as sufficient."

Further on in the opinion, the judge uses this language: "The action, then, being fully sustained, in my judgment, by proof of the act of seduction in the particular case, all the complicated circumstances that followed come in by way of aggravating the damages."

In *White v. Nellis*, 31 N. Y. 405, 407-409, 88 Am. Dec. 282 (which was an action for debauching plaintiff's minor daughter, and communicating to her a venereal disease, by which she was made sick and unable to labor), the judge uses the following language: "Whenever the wrongful act, by immediate and direct consequence, deprives the master of the service of his servant, or injuriously affects his legal right to such service, the law gives a remedy. It is not sufficient to sustain the action to prove the seduction merely. That is the wrongful act from which it must appear that a direct injury to the relative rights of the master has followed. The right of the master, as recognized by the law, is to have the services of the servant undisturbed by the wrongful act of another. In cases of debauchery, the ordinary consequences that affect the master are the pregnancy and lying-in of the servant, during which she is unable to render him service. Hence the precedents of pleadings in this form of action have perhaps invariably alleged a loss of service through those consequences. But it by no means follows that there is no remedy where the loss of service is the direct effect of the wrongful act, although produced by some other consequence. All that the law can require is *damnum et injuria*; for these constitute, when directly connected, the proper and complete elements of an action on the case. And wherever they combine as an immediate cause and effect, the law cannot deny a remedy without a departure from principle. . . . It is maintainable because a wrongful act has caused a direct injury to a lawful right. In such case, the right of the master to a remedy for an injury to his enjoyment of the services of his servant is equally clear, whether it be produced by beating and wounding the servant, or enticing him from employment, or forcibly abducting him, or wrongfully debauching and impregnating with child or with disease. Nor, in my judgment, does the remedy depend upon the sex of the servant. . . . We have now to determine the abstract right to maintain any action at all; and that is something quite

independent of the question what damages may be recovered if the action be allowed."

In the case of *Ingersen v. Miller*, 47 Barb. 47, 50, the general term use this language: "It is no objection to the maintenance of the action that no expense or actual loss of service is proved. It is sufficient that the father was at the time entitled to the services of the daughter, and might have required them had he chosen to do so. . . . The master has a property in the labor of his servant, and any wrongful act creating or producing a disability in the servant to perform what the master has a right to require operates as a disturbance or infringement of such right, to which the law will attach at least nominal damages as a result of the injury. . . . But proof of the slightest loss of service or the most trifling injury, if the direct result of the wrongful act, is sufficient to uphold the action."

In *Badgley v. Decker*, 44 Barb. 588, the opinion of the court at general term holds this language: "There was evidence in this case sufficient to go to the jury upon the question of the relation of master and servant existing between the plaintiff and her daughter. The slightest degree of service has been holden sufficient to maintain the action and to allow a recovery for the heaviest damages, . . . but to accommodate the action to cases where the daughter rendered no service, a presumed or a fictitious service is resorted to as the *gravamen*."

The judgment should be affirmed, with costs.

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**PARENT AND CHILD — INJURY TO CHILD — LOSS OF SERVICES — PARENT'S RIGHT OF ACTION FOR.** — For an injury to a minor child, the father may maintain an action for loss of services, though the right of action for the personal injury remains in the child: *Rogers v. Smith*, 17 Ind. 323; 79 Am. Dec. 483, and note; *County Commissioners v. Hamilton*, 60 Md. 340; 45 Am. Rep. 739. A father may sue for injury to his minor son as for injury to a servant where the son can render services: *Shields v. Fonge*, 15 Ga. 349; 60 Am. Dec. 698; extended note to *Carey v. Berkshire R. R. Co.*, 48 Am. Dec. 622.

**MASTER AND SERVANT — ACTION BY MASTER FOR LOSS OF SERVICES OF SERVANT.** — An action on the case lies in favor of a master against one who causes a servant to leave his employment: *Daniel v. Smearengen*, 6 S. C. 297; 24 Am. Rep. 471, and note; *Hasbins v. Royter*, 70 N. C. 601; 16 Am. Rep. 780. A railroad company may maintain an action against one who maliciously causes the arrest of its engineer while running a train, with the intent to delay the train and injury the company: *St. Johnsbury etc. R. R. Co. v. Hunt*, 55 Vt. 570; 45 Am. Rep. 639.

**Du Bois v. Decker.**

[100 NEW YORK, 385.]

**A PHYSICIAN OR SURGEON ENGAGES TO BRING TO THE TREATMENT OF HIS PATIENT** care, skill, and knowledge, and if he waits too long before undertaking a necessary amputation, he must be held to have known of the probable consequences of such delay, and is therefore answerable for the damages resulting therefrom.

**PHYSICIAN AND SURGEON. — THE FAILURE OF A PATIENT TO OBEY THE INSTRUCTIONS** of his physician cannot destroy his right to recover for previous malpractice, but it may be considered as tending to mitigate damages.

**PHYSICIAN AND SURGEON. — THE FAILURE OF A PATIENT TO OBEY THE INSTRUCTIONS** of his surgeon is excusable, if they are not such as a surgeon of ordinary skill would adopt or sanction. The patient is not required to submit to treatment which is plainly injurious and unskillful, placing in peril his health, and perhaps his life.

**PHYSICIAN AND SURGEON. — BEFORE A SURGEON CAN RELIEVE HIMSELF FROM LIABILITY**, on the ground that his patient did not submit to the course recommended, he must show that it was proper and adapted to the end in view.

**PHYSICIAN AND SURGEON. — LIABILITY OF, WHEN ACTING GRATUITOUSLY. —** The fact that the services of a physician or surgeon were rendered gratuitously does not affect his duty to exercise reasonable and ordinary care, skill, and knowledge, nor his liability to respond for damages resulting from his not exercising them.

*A. T. Clearwater*, for the appellant.

*Samuel T. Hull*, for the respondent.

**HAIGHT, J.** This action was brought to recover damages of the defendant, a physician and surgeon, for alleged malpractice suffered by the plaintiff whilst undergoing treatment as a patient.

On the first day of December, 1889, the plaintiff undertook to jump onto an engine of the Ulster and Delaware railroad, in the city of Kingston, and in doing so slipped, and his left foot was caught by the tender, and a portion thereof crushed. Being destitute, he was taken to the city almshouse, where he was treated by the defendant, who was one of the city physicians having the care of the patients therein, and who was employed for that purpose. Thereafter, and on the tenth day of December, he amputated the plaintiff's leg above the ankle joint, and six or seven days thereafter, gangrene having set in, he again amputated the leg at the knee joint. After the second amputation the leg did not properly heal, but became a running sore, and at the time of the trial the bone protruded some three or four inches.

Evidence was given upon the trial from which the jury might find that the bones of the foot were so crushed that immediate amputation of the injured portions was necessary, and that the appearance of gangrene was in consequence of the delay of ten days in the operation; and that in the second operation the defendant neglected to save flap enough to cover the end of the limb and bone, and that the subsequent protrusion of the bone was owing to this neglect.

The question of defendant's liability consequently became one for the jury. We are aware that he claimed to have waited ten days before operating, for the purpose of seeing whether the foot could not be saved, and that a physician and surgeon will not be held liable for mere errors in judgment. But his judgment must be founded upon his intelligence. He engages to bring to the treatment of his patient care, skill, and knowledge, and he should have known the probable consequences that would follow from the crushing of the bones and tissues of the foot.

In submitting the case to the jury, the defendant asked the court to charge that "if the plaintiff did not obey the defendant's instructions, and this contributed to an aggravation of the injury, the plaintiff cannot recover." The court declined to charge in the form in which the request was put, and an exception was taken by the defendant.

It appears from the testimony of the defendant that after the second amputation he dressed the stump and put the plaintiff in position, by elevating the limb so as to prevent hemorrhage and too much pressure upon the arteries; that the plaintiff did not keep in the position in which he was placed, and got his leg to bleeding, and that he presumed that this bleeding interfered with the healing of the limb. It also appears that some time after the second amputation the plaintiff refused and neglected to take the medicine that was left for him by the defendant, and that subsequently, after the defendant had ordered him to be removed to another room, so as to avoid liability of contracting erysipelas from a patient that had been brought to the almshouse afflicted with that disease, he left and went away.

Whilst the removing of the limb from the position in which it was placed may have produced the bleeding, and thus to some extent impeded the healing, and his going away at the time that he did may also have further aggravated the difficulty, these facts would only tend to mitigate the damages, and

would not relieve the defendant from the consequence of previous neglect or unskillful treatment. As to the prescription, we are not told what it was or what it was for, and the jury was therefore unable to determine whether or not the condition of the patient would have been materially changed by its use.

The request to charge, as we have seen, was to the effect that if the plaintiff did not obey the instructions, and this contributed in aggravation of the injury, the plaintiff cannot recover. This was too broad if the jury found that the defendant was guilty of malpractice prior to the disobedience complained of.

In the case of *Carpenter v. Blake*, 75 N. Y. 12, the court was requested to charge that if the plaintiff was guilty of any negligence in the management of the arm, through or without the fault of the attending surgeon, after the defendant ceased to have charge of the case, and such negligence contributed in any material degree to produce the present bad condition of the arm, the defendant was not responsible. This request was refused, and it was held properly, for the reason that the request was too broad; that if there had been subsequent negligence, the cause of action for defendant's negligence would simply go in mitigation of damages.

In the case of *McCandless v. McWha*, 22 Pa. St. 261-272, Lewis, J., in delivering the opinion of the court, says: "A patient is bound to submit to such treatment as his surgeon prescribes, provided the treatment be such as a surgeon of ordinary skill would adopt or sanction; but if it be painful, injurious, and unskillful, he is not bound to peril his health, and perhaps his life, by submission to it. It follows, that before the surgeon can shift the responsibility from himself to the patient, on the ground that the latter did not submit to the course recommended, it must be shown that the prescriptions were proper and adapted to the end in view. It is incumbent on the surgeon to satisfy the jury on this point, and in doing so he has the right to call to his aid the science and experience of his professional brethren. It will not do to cover his own want of skill by raising a mist out of the refractory disposition of the patient."

The defendant moved to dismiss the complaint, upon the ground that it failed to show a contract relation between the parties, whereby the defendant was employed to attend the plaintiff, and that no facts were alleged showing it to be the duty

of the defendant to treat him in a skillful manner. This motion being denied, the defendant asked the court to charge that as the defendant treated the plaintiff gratuitously, he is liable, if at all, only for gross negligence, which was refused.

It has been held that the fact that a physician or surgeon renders services gratuitously does not affect his duty to exercise reasonable and ordinary care, skill, and diligence: *McCandless v. McWha*, 22 Pa. St. 261-269; *McNevin v. Lowe*, 40 Ill. 209; *Gladwell v. Steggall*, 5 Bing. N. C. 733.

But we do not deem it necessary to consider or determine this question, for it appears that the plaintiff's services were not gratuitously rendered. He was employed by the city as one of the physicians to attend and treat the patients that should be sent to the almshouse. The fact that he was paid by the city instead of the plaintiff did not relieve him from the duty to exercise ordinary care and skill.

Exceptions were taken to the admission and rejection of evidence. We have examined them, and find none that require a new trial.

The judgment should be affirmed, with costs.

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PHYSICIANS AND SURGEONS — DEGREE OF SKILL AND CARE REQUIRED. — The degree of skill and care required of a physician in the performance of an operation is such as physicians ordinarily exercise in the treatment of their patients: *State v. Housekeeper*, 70 Md. 163; 14 Am. St. Rep. 340, and note; note to *Nelson v. Harrington*, 7 Am. St. Rep. 909. Neglect by a physician treating a fracture of the larger bone of the leg to promptly use the customary appliances for extension, whereby the limb was materially shortened, in the absence of proof that the patient was unable to undergo such treatment, will render the physician liable in damages: *Barnes v. Means*, 82 Ill. 379; 25 Am. Rep. 323, and note; extended note to *Howard v. Grover*, 43 Am. Dec. 481.

PHYSICIANS AND SURGEONS — IMPROPER CONDUCT OF PATIENT. — Negligent or improper conduct of a patient will not defeat his right of recovery against the physician for malpractice unless his negligence contributes substantially to the injury for which he seeks to recover: *West v. Martin*, 31 Ma. 375; 60 Am. Dec. 107.

**GRAFTON v. MOIR.**

[100 NEW YORK, 425.]

**CONVEYANCE. — A RESERVATION IN A DEED IN FAVOR OF THE GRANTOR IS CONSTRUED MOST STRONGLY AGAINST HIM.**

**WAY. — THE RESERVATION OF A RIGHT OF WAY THROUGH AND OVER AN ALLEY-WAY does not reserve the alley-way itself, but merely the right to pass through it.**

**WAY. — IF A RIGHT OF WAY IS RESERVED, BUT NOT SPECIFICALLY DEFINED, the way need only be such as is reasonably necessary and convenient for the purpose for which it was granted.**

**WAY. — OWNER OF LAND OVER WHICH ANOTHER HAS A RIGHT OF WAY MAY USE IT in any manner that he sees fit, provided he does not unreasonably interfere with the latter's reasonable use in passing to and fro.**

**WAYS — WIDTH OF. — A right of way along a private road or alley-way does not give the owner of such way a right to insist that it shall not be altered and the width decreased, unless the whole is necessary for his purposes.**

**WAY. — THE OWNER OF LAND OVER WHICH ANOTHER HAS A RIGHT OF WAY HAS THE RIGHT to construct buildings over such way, provided they are such as will permit of its use for the purposes of passing to and fro in the manner which the parties are presumed to have had in view when the grant of the right of way was made.**

**WAYS — RIGHT TO INCLOSE. — A person entitled to a right of way cannot successfully claim that he has also a right to the air and ventilation coming through and from the space which constituted the alley-way at the time of the grant. Where a grant or reservation is of a right of way merely, it carries with it, as incidentals thereto, only such light and air as are necessary to its convenient enjoyment.**

**WAY. — A RIGHT OF WAY TO A STABLE does not carry with it such light and air as the stable requires, but such as the right of way needs for its convenient enjoyment.**

*Treadwell Cleveland, for the appellant.*

*Stephen H. Olin, for the respondent.*

VANN, J. The right of the defendant to erect the building in question depends upon the reservation contained in the deed dated June 1, 1852, by which the original proprietor of the four lots conveyed the first to the defendant's grantor, and is not at all dependent on the reservation in the later deed, dated December 31, 1852, by which said proprietor conveyed the third lot to the plaintiff's grantor. The rights of the defendant were defined and fixed by the earlier conveyance, and were not out down or affected by the later conveyance, to which he was neither party nor privy. The reservation in the deed under which the defendant claims, and which created



the easement over the alley, so far as it affects his premises, is in these words:—

“Reserving, nevertheless, to the owners and occupants of the three houses and the three stables on the easterly side of Fifth Avenue, next north of the premises above conveyed, the right of way through and over the carriage or alley way in the rear of the said above-granted premises to the three stables next north of the one standing on the rear of the above-granted premises, as long as the said three stables shall be occupied as private stables.”

As the conveyance was in fee, it vested in the grantee and his assigns all the rights of absolute ownership, except as restricted by the reservation, which, being in favor of the grantor, is to be construed most strongly against him: *Duryea v. Mayor etc.*, 62 N. Y. 592, 597; *Borst v. Empie*, 5 N. Y. 33, 39; *Jackson v. Blodgett*, 16 Johns. 172; *Jackson v. Gardner*, 8 Johns. 394; *Ives v. Van Auken*, 34 Barb. 566.

The reservation is of “the right of way through and over the carriage or alley way” to the stables, and is to continue as long as the stables are “occupied as private stables.” The grantor did not reserve the alley-way itself, but the right of way over it, which means simply the right to pass over it: *Bodfish v. Bodfish*, 105 Mass. 319; *Kripp v. Curtis*, 71 Cal. 63; *Stuyvesant v. Woodruff*, 21 N. J. L. 133; 47 Am. Dec. 156; *Williams v. Western U. R’y Co.*, 50 Wis. 76; 2 Washburn on Real Property, 275.

The right of way was not reserved for all purposes, but for the use of private stables only, as the right continues while the buildings are used for that purpose, and ceases when the specified user ceases. It was not bounded or defined, except as it was limited to the use named. Nothing except a right of way as thus limited was reserved. While the alley-way, as laid out at the date of the grant, was eighteen feet wide, the right to pass over every part of that eighteen feet was not reserved, unless that right was necessary in order to pass and repass in the usual way, and with the usual means, between the stables and the street. The use by the grantor of the words “carriage or alley way” in the alternative indicates that he regarded “carriage-way” and “alley-way” as meaning the same thing, and that he meant by neither the alley as laid out, but the carriage-way that passed over the alley. In fact, he did not use the word “alley” by itself at all, but he is pre-

sumed to have had in mind the existing condition of things upon which his conveyance was to operate.

Thus we have a right of way reserved, but not specifically defined; and the rule in such cases is, that the way need be only such as is reasonably necessary and convenient for the purpose for which it was created: *Atkins v. Bordman*, 2 Met. 457; 37 Am. Dec. 100; *Bliss v. Greeley*, 45 N. Y. 671; 6 Am. Rep. 157; *Bakeman v. Talbot*, 31 N. Y. 366, 370; 88 Am. Dec. 275; *York v. Briggs*, 7 N. Y. St. Rep. 124; *Maxwell v. AcAtee*, 9 B. Mon. 20; 48 Am. Dec. 409; *Rexford v. Marquis*, 7 Lans. 249; *Matthews v. Delaware etc. Canal Co.*, 20 Hun, 427; *Spencer v. Weaver*, 20 Hun, 450; *Tyler v. Cooper*, 47 Hun, 94; affirmed, 124 N. Y. 626; *Washburn on Easements*, 244; *Goddard on Easements*, 333.

When the right of way is not bounded in the grant, the law bounds it by the line of reasonable enjoyment. The defendant, as owner of the land, has the right to use it in any way that he sees fit, provided he does not unreasonably interfere with the rights of the plaintiff. All that is required of him is that he shall not so contract the alley-way, either vertically or laterally, as to deprive the plaintiff of a reasonable and convenient use of the right of passing to and fro. Thus the grant of a right of way "through and over" a space twenty feet wide, was held to be "the grant of a convenient way within those limits": *Johnson v. Kinnicutt*, 2 Cush. 153.

As is said in *Goddard on Easements*, p. 332: "A right of way along a private road belonging to another person does not give the dominant owner a right that the road shall be in no respect altered or the width decreased, for his right does not entitle him to the use of the whole of the road, unless the whole width of the road is necessary for his purpose, but is merely a right to pass with the convenience to which he has been accustomed; . . . and even where a right of way was granted over certain roads marked on a plan, and one was described there as forty feet wide, it was held that the grantee was entitled to only a reasonable enjoyment of a right of way, and that such reasonable enjoyment was not interfered with by the erection of a portico, which extended a short distance into the road, so as to reduce it at that point to somewhat less than forty feet"; citing *Clifford v. Hoare*, L. R. 9 C. P. 362; *Hutton v. Hamboro*, 2 Fost. & F. 218.

Was eighteen feet in width, or more than eleven feet in height, essential to the reasonable enjoyment by the plaintiff of a mere

right of passing to and fro with such vehicles as are used at private stables? Is not the right of way, as it now is, all that is reasonable and necessary for the purpose for which it was granted? When the terms of the reservation are considered in connection with the nature and condition of the premises granted at the time of the execution of the deed, the purpose that the parties are presumed to have had in view, and the use which in practice they have made of the way, as found by the trial court, we are of the opinion that the defendant has not interfered with the reasonable enjoyment by the plaintiff of the easement created by the grant.

It is insisted, however, in behalf of the plaintiff, that he is entitled to the light, air, and ventilation coming through and over the open space which constituted the alley at the date of the deed. If the alley itself had been reserved, or the right to use it for every purpose, a different question would have arisen, but neither the alley nor the alley-way was reserved, nor anything except the right of way over the alley-way or carriage-way. The language of the reservation confers upon the plaintiff simply the right of passage, and as incidental thereto, such light and air as are necessary to the convenient enjoyment of that right. There is no provision which expressly or impliedly requires that the entire space at the rear of defendant's building shall be kept open forever, so that the plaintiff's stables may have air and light. A right of way to a stable does not carry with it such light and air as the stable needs, but such as the right of way needs for its reasonable enjoyment. As was said in *Atkins v. Bordman*, 2 Met. 457, 37 Am. Dec. 100, the leading case upon the subject: "As to the darkening, . . . the defendants were not liable for damages, unless, from the length of the passage-way, it was so darkened as to render it unfit for the purposes of a passage-way. We may conceive of a covered passage of eight or ten feet high, of a length so considerable that unless openings were left there would not be light enough admitted at the ends to enable persons to use it with comfort for the purposes of a passage-way, but unless darkened to that extent, it is not a case for damage"; citing *Parker v. Smith*, 5 Car. & P. 438; *Back v. Stacey*, 2 Car. & P. 465; *Wells v. Ody*, 7 Car. & P. 410; *Pringle v. Wernham*, 7 Car. & P. 877.

In *Gerrish v. Shattuck*, 132 Mass. 285, the defendant built over "a passage-way four feet wide" that had been reserved "in, through, and over" certain premises, but placed no part

of his building on the surface of the ground, and left the way unobstructed for a reasonable height above. It was held that the plaintiff, as the dominant owner, had "no right to light and air above the way," and that she had "only the right of passing and repassing, with such incidental rights as are necessary to its enjoyment."

To the same effect is *Burnham v. Nevins*, 144 Mass. 88; 59 Am. Rep. 61.

But where the easement was "a passage-way five feet wide in the clear for light and air," and "always to be kept open for the purpose aforesaid," it was held that the dominant owner had a right to the open and unobstructed passage of light and air from the ground upwards, and throughout the length of the passage-way: *Brooks v. Reynolds*, 106 Mass. 31.

If the alley-way in question had been protected by a restriction of that kind, the claim of the plaintiff would have had a basis in the deed, which would have shown on its face that it was the purpose of the parties to create something more than a mere right of passage. As it is, we can find no such intention, because, as we have held, the deed calls for a right of way, and nothing more. The space at the rear of the plaintiff's premises is under his exclusive control, subject to the right of way over it, and he can ventilate and light his stable by keeping that space open, but he cannot prevent his neighbor, two doors away, from building on his own land, even if it cuts off some light and air, as long as a suitable passage is left open, with enough light and air to conveniently use it.

Upon the facts as found, and under the conveyance as we construe it, no right of the plaintiff has been interfered with by the defendant, and the judgment should therefore be affirmed, with costs.

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**PRIVATE WAYS — RIGHTS OF GRANTEE.** — The grantee of a right of way has not only a right of passage at all times over the grantor's land, but also such rights as are necessary and incident to such passage: *Herman v. Roberts*, 119 N. Y. 37; 16 Am. St. Rep. 800, and note; extended note to *Welch v. Wilson*, 100 Am. Dec. 114; extended note to *Babson v. Talbot*, 88 Am. Dec. 279.

**PRIVATE WAYS — RIGHTS OF OWNER OF SERVIENT ESTATE TO ERECT BUILDINGS OVER.** — The grantor of a private way may cover that way by building over it, provided he leaves a space high and wide enough to reasonably answer the purpose for which such passage was reserved: *Atkins v. Berdman*, 2 Met. 457; 37 Am. Dec. 100, and note; note to *Burnham v. Nevins*, 59 Am. Rep. 64.

**PRIVATE WAYS — DIMENSIONS NOT EXPRESSED.** — Where the dimensions

of a way are not expressed, but the object of the reservation is expressed, the dimensions must be inferred to be such as are reasonably sufficient to accomplish the object: *Athins v. Bordman*, 2 Met. 457; 37 Am. Dec. 100, and note.

DEEDS are most strongly construed against the grantor: Note to *Athins v. Bordman*, 37 Am. Dec. 115.

## DE CORDOVA v. BARNUM.

[180 NEW YORK, 615.]

**COLLATERAL SECURITIES.** — **BROKER HOLDING COLLATERAL SECURITIES IS NOT REQUIRED TO REALIZE UPON THEM** before bringing an action to recover judgment upon a debt for the securing.

**BROKERS.** — **A CUSTOM OF BROKERS**, when collateral securities are put up as a margin, and an account becomes sufficiently reduced to jeopardize it, to advertise and sell the collaterals before proceeding against their customer for the amount due from him, is of no effect when the stocks of the customer have been sold at his request, and the broker is not carrying anything for him upon a margin. Hence a broker may then maintain an action for the balance due him, without first realizing on the collaterals in his hand.

*William Romer and Stephen S. Marshall*, for the appellant.

*Everett P. Wheeler*, for the respondent.

**LANDON, J.** The plaintiff was a stock-broker, and brought this action to recover of the defendant a balance of account representing the losses upon the purchase and sale of certain stocks made by the plaintiff at the request of the defendant and upon a margin.

The transactions and the amount due the plaintiff upon upon them were established by the evidence, and the judgment should be affirmed, unless errors to the prejudice of the defendant were committed upon the trial.

It appeared from the evidence that during the pendency of the stock transactions in question, the defendant assigned to and deposited with the plaintiff fourteen shares of the Arms Horse Palace Car Company's stock to protect plaintiff from loss on the stock transactions. The defendant's speculations were unfortunate, and he finally gave plaintiff an order to sell out at the best he could get, and plaintiff did so. The plaintiff still holds the horse palace car stock.

The defendant asked the court to hold, or to instruct the jury, that the plaintiff could not maintain this action without showing that he had used all reasonable means to realize upon the fourteen shares of stock which he held as collateral; that

it was plaintiff's duty to advertise and sell it, and credit defendant with the proceeds, or to return it to defendant before this action was brought. The court refused to hold as requested. The defendant offered to prove the value of the fourteen shares of stock; the plaintiff's objection to such proof was sustained.

In these rulings no error was committed. The plaintiff held the fourteen shares of horse palace car stock as collateral security to protect him from loss. There was no special agreement that the plaintiff should first realize upon the collateral before bringing an action against the defendant to recover the debt due him, and therefore the plaintiff was not required to realize upon the collateral before resorting to this action: *Butterworth v. Kennedy*, 5 Bosw. 143; *South Sea Co. v. Duncomb*, 2 Strange, 919; *Lawton v. Newland*, 2 Stark. 64; *Eames v. Widdowson*, 4 Car. & P. 151; *Elder v. Rouse*, 15 Wend. 218; *Colebrook on Collateral Securities*, 136; *Jones on Pledges*, sec. 590.

The defendant offered to prove by a witness that it was the custom of stock-brokers, when collateral security was put up as a margin, and the account became reduced sufficiently to jeopardize it, to advertise and sell the collateral security, and to charge his customer with the balance, and that such was the usage of the plaintiff, known to the defendant at the time the margin was put up, and at the time of closing the account.

The court was justified in sustaining the objection to this offer, because the plaintiff sold out defendant's stocks upon defendant's express order, and not to protect himself because of a shrinking or exhausted margin. Whatever the custom of brokers may be while the speculation is pending, it can have no application to the broker's right to recover what is due him after he has carried his customer's stocks as long as requested, and finally sold them pursuant to his express order.

The other exceptions do not require discussion.

The judgment should be affirmed, with costs.

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**BROKERS. — COLLATERAL SECURITY — NECESSITY TO REALIZE UPON. —** A person holding collateral securities is not bound to resort to them before suing upon his principal claim, but when that claim is satisfied, he may be compelled to reassign or release the collaterals: *Wallace v. Finnegan*, 14 Mich. 170; 90 Am. Dec. 243, and note. See note to *Miller v. Gettysburg Bank*, 34 Am. Dec. 451.

**REILLY v. HART.**

[130 NEW YORK, 625.]

**JURISDICTION.** — **THE DEATH OF THE PLAINTIFF WHILE THE SUMMONS IN THE ACTION IS BEING SERVED BY PUBLICATION** leaves the action in a suspended condition, and no proceeding can be taken until his executor or administrator is substituted as a party plaintiff in his place, and if the publication of the summons is continued as though the plaintiff remained alive, it is ineffectual to confer jurisdiction over the defendants.

*John R. Kuhn*, for the appellants.

*Jesse Johnson*, for the respondent.

**BRADLEY, J.** The controversy arose upon the refusal of the defendant to complete the purchase of certain land in the city of Brooklyn, which land was the subject of a contract between the parties, whereby the plaintiffs agreed to sell and convey it by full covenant warranty deed to the defendant, and the latter to purchase it at the price of \$3,360. The refusal was upon the asserted ground that the plaintiffs were unable to convey a perfect title to the premises. The title of the plaintiffs was derived from the purchaser of the property on a sale made pursuant to a judgment of foreclosure of a mortgage. And the objection was founded on the charge that such foreclosure sale was ineffectual to bar the equity of redemption of one Lynch, who had the title subject to the mortgage. Lynch and his wife resided in the state of Louisiana. The action to foreclose the mortgage was commenced by one Coggshall in November, 1874, by the service of the summons personally upon two defendants other than Lynch and his wife. And in December following an order for service of the summons by publication upon them was obtained, and the summons was published accordingly, but before that service was completed the plaintiff in the action died. The publication of the summons, nevertheless, proceeded to the termination of the six weeks, the time directed by the order. And afterwards, pursuant to the order of the court in which that action was brought, it was continued in the name of the executrix of the will of the deceased plaintiff. The defendants Lynch did not appear; and the decree was thereafter entered, and the sale pursuant to it had. The question is, whether the summons was effectually served upon defendants Lynch. The action, having been commenced by the personal service of the summons on the two other defendants, was properly continued in the name of the



executrix as plaintiff: Code, sec. 121; *Livermore v. Bedenbridge*, 49 N. Y. 125.

As the requisite time to effect service by publication had not expired at the time of the death of the original plaintiff, the summons had not then been served upon the defendants Lynch, and the court had acquired no jurisdiction of them, although it had of the action by the personal service of the other defendants. But the effect of the death of the plaintiff was to produce a suspension of further proceedings until his successor was placed in that relation to the action. What had been accomplished in it while there was a plaintiff remained effectual, and when the executrix became such, progress in the action could properly be made from the place in the proceedings where the suspension had left them: *Moore v. Hamilton* 44 N. Y. 666.

In that view, the order for service of the summons by publication may have remained available, but it is not seen how the four weeks' publication of the summons before the death, and the two weeks following, could be treated as an effectual service upon those non-resident defendants. During the latter period there was no plaintiff, and in practical effect no action to support any proceedings within that time. The prior publication of the summons was then an unaccomplished attempt to serve it. And to constitute a service in that manner, it was necessary to publish once in each of six successive weeks in the two designated newspapers. There was, then, no service of the summons on those defendants while the action in which the order was made had any party plaintiff, and for that reason it was in a suspended condition, and could not support any proceeding then taken for any purpose other than to continue it in the name of the successor as such. Before the death of the original plaintiff the court had acquired no jurisdiction of those defendants. It could not obtain any during the suspension following his death, and consequently it had no jurisdiction of them at the time the executrix became plaintiff; and it does not appear that their persons were thereafter in any manner brought in that relation to the court. It is suggested that the situation is no different than it would be in case of an assignment by a plaintiff during the pendency of an action, but it may be seen that in such case there would continuously be a plaintiff, and for that reason not necessarily any legal suspension of proceedings. As the statutory provisions relating to the continuance of the action at the time in

question were in the old code, no reference to those of the present code is called for; but the latter, in the respect under consideration, do not modify the rule applicable to the present case.

These views lead to the conclusion that the defendant was justified in his refusal to accept, under the contract, the title which the plaintiffs were able to convey, and that the judgment should be affirmed.

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**ABATEMENT OF ACTION BY DEATH OF PLAINTIFF.** — At common law, in all actions where there were two or more plaintiffs, the death of one of them, pending the action, was an abatement of the action: *Haven v. Brown*, 7 Greenl. 421; 22 Am. Dec. 208. *Gainer v. Gainer*, 30 W. Va. 390, is a case in which the action abated by the death of the plaintiff. Judicial writs do not generally abate by the death of a party, but it is otherwise as to the original writ: *Hansen v. Barnes*, 3 Gill & J. 359; 22 Am. Dec. 322, and note.

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## PEOPLE v. WEMPLE

[131 NEW YORK, 64.]

**TAXATION — JURISDICTION.** — A CORPORATION CREATED BY THE LAWS OF ANOTHER STATE, but doing business in this state, is subject to the jurisdiction of the officer whose duty it is to determine and assess the amount of taxes which the corporations are bound to pay to the state, and is subject to taxation as well as a domestic corporation.

**TAXATION — JURISDICTION — TAX ON FOREIGN CORPORATIONS.** — If a corporation created by the laws of a sister state employs the whole or any part of its capital here, and thus has the benefit and protection of the government and laws of the state to the extent of the capital so employed, there is no reason why it should not be subject, to the extent of such capital, to the same burdens and obligations as a domestic corporation. The tax is imposed for the privilege, which is extended to it by the statute, of doing business here as a corporation and in its corporate name.

**CONSTITUTIONAL LAW — REGULATION OF COMMERCE.** — A STATUTE IMPOSING A TAX UPON CORPORATIONS created in another state, the basis of which is the amount or portion of their capital in use in this state in the transaction of their ordinary business, is not in conflict with the provision of the constitution of the United States conferring upon Congress the power to regulate commerce between the states. When the state permits a foreign corporation to transact business within its limits in its corporate name, and imposes taxes on it for the privilege, this is not a regulation of interstate commerce, but a lawful exercise of the power of taxation upon a corporation that for the time being is within its jurisdiction for that purpose.

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*Charles F. Tabor*, attorney-general, for the appellee.

O'BRIEN, J. The relator is a corporation organized under the laws of New Jersey, having an authorized capital of five million dollars, four million of which has been issued. On September 2, 1890, the comptroller of this state, in pursuance of chapter 361 of the Laws of 1881, fixed and determined the amount of taxes due from the relator to the state for the three years ending November 1, 1889, at \$2,303.42, and in arriving at this result, he found that the amount of its capital stock employed by the relator within this state was \$100,000 for the year 1887, \$1,333,333 for the year 1888, and \$121,212 for the year 1889. No question appears to be made by the relator in regard to the correctness of the comptroller's action in estimating and fixing the amount of its capital in use in this state, or in determining the amount of the tax thereon, if it is liable for any tax at all. The relator's sole contention on this branch of the case is, that it is not doing business within the state, and hence is not within the statute. If the relator is within the statute, and the comptroller had jurisdiction to inquire and determine whether the relator was employing any part of its capital in business within this state, and if so, the amount, we do not understand that the relator complains of the disposition made of the facts bearing on the questions of value. In regard to the facts bearing on the question whether the relator is doing business within this state, the return to the writ of *certiorari* brought to review the action of the comptroller states that it "consisted in part of maintaining a sales agency in the city of New York, and in selling the product of its mills in this state, and in refining crude oil within this state, and delivering the same to purchasers therein, and maintaining a depot or warehouse in the state of New York for the storage of its products therein, and in keeping on deposit, in the banks in the city of New York, large sums of money for the use of the relator and for the carrying on of its business; that during the year 1887, nearly forty per cent of the total sales of products by the relator were sales made in the state of New York; and during the year 1888, over thirty-three and one third per cent of the total sales of relator's products were made in the state of New York; and during the year 1889, over three per cent of its total sales were made in the state of New York." It further appears that the relator's business is the manufacture and production of oil from cotton-seed, and refining and selling the same. Its principal office is at Camden, New Jersey, but it has an office or agency in the city of New York.

During the year 1888, it kept in banks of this state, for use in the transaction of its business, \$15,124, and during the year 1889, \$88,778.74. During the three years for which the tax was assessed, it sold in this state about one third of its whole product. There can be no doubt that a corporation created by the laws of another state, but doing business in this state, is subject to the jurisdiction of the officer whose duty it is, under the act of 1881, to determine and assess the amount of taxes which corporations are bound to pay to the state, and is subject to taxation as well as a domestic corporation. The basis of the tax is the amount or portion of its capital in use here in the transaction of its ordinary business. How much that may be in any particular case is generally a question of fact, to be determined by the comptroller under the procedure pointed out by the statute. There is no injustice or hardship in such a law. If a foreign corporation or a corporation created by the laws of a sister state employs the whole or a portion of its capital here, and thus has the benefit and protection of the government and laws of the state to the extent of the capital so employed, there is no reason why it should not be subjected, to the extent of the capital so employed, to the same burdens and obligations as a domestic corporation. The tax is not imposed upon its property, but for the privilege which is extended to it by the state of doing business here as a corporation and in its corporate name. Since the statute has been amended so as to make the amount of capital used in this state the basis of the tax, the amount of business transacted here is of much less importance than formerly. If but a very small part of the corporate business is done here, and but a small part of the capital employed here, then the tax is correspondingly light. The facts in this case show that during the year for which the assessment was made, the relator employed a portion of its capital and conducted a substantial part of its business operations within this state, and that was enough to subject it to the obligation to defray some part of the public burdens. The statute in question, in its application to corporations created by the laws of another state and doing business here, has been frequently construed by this court, and the principles applicable to such cases stated. The facts of this case bring it within the rule of liability enunciated in these cases: *People v. Equitable Trust Co.*, 96 N. Y. 387; *People v. Horn Silver Mining Co.*, 105 N. Y. 76; *People v. Wemple*, 129 N. Y. 540.

The statute under which the tax in question was imposed is not in conflict with the provisions of the federal constitution, which confers upon Congress the exclusive power to regulate commerce between the states. Though the relator is a New Jersey corporation, its principal manufacturing operations are carried on in the southern or cotton-producing states. For the purpose of disposing of its product, it is necessary or convenient to establish and keep an agency in the city of New York, and to employ some part of its capital here, though it may be a comparatively small part, and to sell a considerable part of the product of its factories here. All this it does in its corporate name and character. The state has the power to exclude corporations of other states from doing business within its jurisdiction. If, however, it permits them to come here and transact their business, it may impose a tax upon them for this privilege, and this is not a regulation by the state of interstate commerce, but a lawful exercise of the power of taxation upon corporate bodies that for the time being are within its jurisdiction for that purpose. If the contention of the learned counsel for the relator should prevail, then any manufacturing corporation in other states, or even in a foreign country, could come here and establish an office or agency, and transact a part, or even the whole, of its business here, and escape taxation entirely, upon the ground that it was engaged in selling some part of its product in other states or in foreign countries, and therefore was engaged in interstate or foreign commerce, within the meaning of the federal constitution. The commercial clause of the federal constitution does not preclude the states from exercising the power of taxation in such a case as is disclosed by this record. The cases in which statutes enacted by the states have been held invalid as regulations of commerce were stated by Mr. Justice Field in *Sherlock v. Alling*, 93 U. S. 102. As those legislative acts which "imposed a tax upon some instrument or subject of commerce, or exacted a license fee from parties engaged in commercial pursuits, or created an impediment to the free navigation of some public waters, or prescribe conditions in accordance with which commerce in particular articles, or between particular places, was required to be conducted." They are all cases which operate directly upon commerce. In another part of the same opinion the learned judge explains the scope and meaning of the provision conferring upon Congress exclusive power

to regulate commerce. "In conferring upon Congress the regulation of commerce, it was never intended to cut the states off from legislating on all subjects relating to the health, life, and safety of its citizens, though the legislation might indirectly affect the commerce of the country. Legislation in a great variety of ways may affect commerce, and persons engaged in it, without constituting a regulation of it, within the meaning of the constitution." The only limitation upon the power of a state to exclude a foreign corporation from doing business within its limits, or to exact conditions for such a privilege, arises where the corporation is in the employ of the federal government, or where its business is strictly commerce, interstate or foreign: *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 12; *Pembina etc. Mining Co. v. Pennsylvania*, 125 U. S. 181, 190.

The cases are numerous in the highest federal court where legislation such as that now under consideration has been held to be valid, and none of the cases cited by the learned counsel for the relator hold that a state statute imposing a tax upon a manufacturing corporation of another state for the privilege of doing business here is invalid: *State Freight Tax Cases*, 15 Wall. 232; *State Tax on Gross Receipts*, 15 Wall. 284; *Delaware R. R. Tax Case*, 18 Wall. 208; *Erie R'y Co. v. Pennsylvania*, 21 Wall. 492; *Philadelphia Fire Ass'n v. New York*, 119 U. S. 119; *Smith v. Alabama*, 124 U. S. 482; *Horns Ins. Co. v. New York*, 134 U. S. 599; *Marye v. Baltimore and Ohio R. R.*, 127 U. S. 123. The property of a foreign corporation engaged in foreign or interstate commerce may be taxed equally with like property of a domestic corporation engaged in the same business; but a tax or other burden imposed upon the property of either corporation because it is used to carry on that commerce, or upon the transportation of persons or property, or for the navigation of the public waters over which the transportation is made, is invalid and void, as interference with and obstruction of the power of Congress in the regulation of commerce: *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 211.

The obligation imposed upon the relator by the act of 1881, to pay a tax to the state treasury as a condition of enjoying the privilege of transacting business here, does not, in our opinion, conflict with any provision of the federal constitution.

The judgment of the general term should be affirmed with costs.

**INTERSTATE COMMERCE, CONSTITUTIONALITY OF STATE REGULATIONS OF. —**  
*Constitutional Provisions.* — One of the powers conferred upon the Congress of the United States by section 8 of article 1 of the national constitution is that of regulating commerce "with foreign nations, and among the several states, and with the Indian tribes." Among the limitations of the powers of the individual states contained in section 10 of the same article are, "that no state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, and the net produce of all duties and imposts laid by any state on imports or exports shall be for the use of the treasury of the United States, and all such laws shall be subject to the revision and control of Congress," and "no state shall, without the consent of Congress, lay any duty on tonnage." The object of this note is to aid in determining what legislation on the part of the states may be disregarded and pronounced invalid, either because it is upon a subject committed to Congress by section 8, or upon which the states are expressly forbidden to act by section 10; in other words, in determining what state legislation is invalid for the reason that it interferes with interstate commerce or with commerce with a foreign nation.

*Concurrent Authority of Congress and of the State Legislatures.* — One of the most difficult questions to decide was, whether or not the clauses of the constitution which we have quoted left any concurrent power in the states over the subjects to which those clauses relate. With respect to the prohibitions mentioned in section 10, there could be no doubt that they excluded or annulled all state action except upon the conditions there prescribed. But the power given Congress by section 8, "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes," is not in terms exclusive; and if the power of the states to act upon the same subject is excluded, or to the extent to which it is excluded, the exclusion results from the impossibility of there existing two sovereigns having at the same time the right to regulate and control the same subject-matter. There can never have been any reasonable doubt that when Congress exercised to any extent the power given it to regulate commerce, whatever it did within the limits of the power conceded to it was paramount to any state action and beyond the reach of any state annulment. But many regulations which directly or indirectly affect commerce with foreign nations or among the several states may be enacted which do not conflict with any pre-existing regulation of commerce, and against the policy of which the national legislature has never spoken. Do these regulations remain in force until the national legislature prescribes some rule inconsistent with them? or does the mere grant of the power to Congress exclude all state action, whether Congress thinks proper to exercise its powers or not? "The doctrine now firmly established is, that where the subject upon which Congress can act under its commercial power is local in its nature or sphere of operation, such as harbor pilotage, the improvement of harbors, the establishment of beacons and buoys to guide vessels in and out of port, the construction of bridges over navigable rivers, the erection of wharves, piers, and docks, and the like, which can be properly regulated only by special provisions adapted to their localities, the state can act until Congress interferes and supersedes its authority; but where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the states, such as transportation between the states, including the importation of goods from one state into another, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration



that commerce in that matter shall be free. Thus the absence of regulations as to interstate commerce with reference to any particular subject is taken as a declaration that the importation of that article into the states shall be unrestricted": *Bowman v. Chicago etc. R'y Co.*, 125 U. S. 507; *Leisy v. Hardin*, 135 U. S. 108; *Welton v. State of Missouri*, 91 U. S. 275; *County of Mobile v. Kimball*, 102 U. S. 691; *Bagg v. Wilmington etc. R. R. Co.*, 109 N. C. 279; 28 Am. St. Rep. 569.

Considering the objections made to a statute of the state of Mississippi, providing for the improvement of the river, harbor, and bay of Mobile, Mr. Justice Field, speaking for the supreme court of the United States, said: "The objection that the law of the state, in authorizing the improvement of the harbor of Mobile, trenches upon the commercial power of Congress, assumes an exclusion of state authority from all subjects in relation to which that power may be exercised, not warranted by the adjudications of this court, notwithstanding the strong expressions used by some of its judges. That power is indeed without limitation. It authorizes Congress to prescribe the conditions upon which commerce in all its forms shall be conducted between our citizens and the citizens or subjects of other countries, and between citizens of the several states, and to adopt measures to promote its growth and insure its safety. And as commerce embraces navigation, the improvement of harbors and bays along our coast, and of navigable rivers within the states connecting with them, falls within the power. The subjects, indeed, upon which Congress can act under this power are of infinite variety, requiring for their successful management different plans or modes of treatment. Some of them are national in their character, and admit and require uniformity in their regulation, affecting alike all the states; others are local, or are mere aids to commerce, and can only be properly regulated by provisions adapted to their special circumstances and localities. Of the former class may be mentioned all that portion of commerce with foreign countries or between the states which consists in the transportation, purchase, sale, and exchange of commodities. Here there can, of necessity, be only one system or plan of regulations, and that Congress alone can prescribe. Its non-action in such cases, with respect to any particular commodity or mode of transportation, is a declaration of its purpose that the commerce in that commodity or by that means of transportation shall be free. There would otherwise be no security against conflicting regulations of different states, each discriminating in favor of its own products and citizens, and against the products and citizens of other states. And it is a matter of public history that the object of vesting in Congress the power to regulate commerce with foreign nations and among the states was to insure uniformity of regulation against conflicting and discriminating state legislation": *Mobile County v. Kimball*, 102 U. S. 696.

There may, in some instances, be a difficulty in determining whether the regulation in question is upon a subject "national in its character," and which "admits and requires uniformity of regulation, affecting alike all the states"; but if it is ascertained to belong to that class, then it is now established that it must be disregarded. "As the grant of power to regulate commerce among the states, so far as one system is required, is exclusive, the states cannot exercise that power without the consent of Congress, and in the absence of legislation, it is left for the courts to determine when state action does or does not amount to such exercise; or in other words, what is or is not a regulation of such commerce. When that is determined, the controversy is at an end": *Leisy v. Hardin*, 135 U. S. 100.

Speaking upon the same topic, Mr. Justice Bradley, in *Brown v. Houston*,

114 U. S. 630, said: "The power to regulate commerce among the several states is granted to Congress in terms as absolute as is the power to regulate commerce with foreign nations. If not in all respects an exclusive power, if in the absence of congressional action the states may continue to regulate matters of local interest only incidentally affecting foreign and interstate commerce, such as pilots, wharves, harbors, roads, bridges, tolls, freights, etc., still, according to the rule laid down in *Cooley v. Board of Wardens*, 12 How. 319, the power of Congress is exclusive wherever the matter is national in its character, or admits of one uniform system or plan of regulation; and is certainly so far exclusive that no state has power to make any law or regulation which will affect the free and unrestrained intercourse and trade between the states, as Congress has left it, or which will impose any discriminating burden or tax upon the citizens or products of other states coming or brought within its jurisdiction. All laws and regulations are restrictive of natural freedom to some extent, and where no regulation is imposed by the government which has the exclusive power to regulate, it is an indication of its will that the matter shall be left free. So long as Congress does not pass any law to regulate commerce among the several states, it thereby indicates its will that that commerce shall be free and untrammelled; and any regulation of the subject by the states is repugnant to such freedom."

The following state regulations have been held to affect matters national in their character, and admitting and requiring uniformity of regulation, and therefore to be invalid, though not in conflict with any regulation prescribed by Congress: Imposing taxes on any passenger from a foreign country landing at a port of this state: *People v. Compagnie Generale*, 107 U. S. 59; prohibiting common carriers from bringing intoxicating liquors from any other state or territory without first being furnished with a certificate as prescribed in the state statute: *Bowman v. Chicago & N. W. Railway*, 125 U. S. 508; exacting the payment of a specific sum per week or month from all persons selling merchandise by sample: *Robbins v. Shelby Taxing District*, 120 U. S. 493; taxing freight transported from state to state: *State Freight Tax Cases*, 15 Wall. 232; granting exclusive rights to establish and maintain electric telegraph lines: *Pensacola Tel. Co. v. W. U. Tel. Co.*, 96 U. S. 1; or to navigate all the waters within the jurisdiction of the states, with boats moved by fire or steam: *Gibbons v. Ogden*, 9 Wheat. 1; requiring all persons engaged in the transportation of passengers among the states to give all persons traveling within the state, upon vessels employed in such business, equal rights and privileges in all parts of the vessel, without distinction on account of race or color: *Hall v. De Cuir*, 95 U. S. 485; imposing a tax on the gross receipts of railroads for the carriage of freight and passengers into, out of, or through the state: *Fargo v. Michigan*, 121 U. S. 230; or upon the gross receipts of a steamship company, derived from the transportation of persons and property by sea between different states: *Philadelphia S. S. Co. v. Pennsylvania*, 122 U. S. 326. Various other regulations of the character here under consideration are referred to in other parts of this note, under appropriate headings. The views ultimately prevailing in the supreme court of the United States upon this subject were first most distinctly promulgated by Judge Curtis in his opinion in *Cooley v. Board of Wardens*, 12 How. 318, in which he said: "The diversities of opinion, therefore, which have existed upon this subject, have arisen from the different views taken of the nature of this power. But when the nature of a power like this is spoken of, when it is said that the nature of the power requires that it should be exercised exclusively by Congress, it must be intended to refer to the subjects of that power, and to say they are of such a nature as

to require exclusive legislation by Congress. Now, the power to regulate commerce embraces a vast field, containing not only many, but exceedingly various, subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity which alone can meet the local necessities of navigation. Either absolutely to affirm or deny that the nature of this power requires exclusive legislation by Congress is to lose sight of the nature of the subjects of this power, and to assert, concerning all of them, what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress."

The ultimate views of the supreme court upon this subject, together with the authorities supporting them, are well represented by the following extract from the opinion of Mr. Justice Bradley, speaking for the court in *Robbins v. Shelby Taxing Dist.*, 120 U. S. 492: "1. The constitution of the United States having given to Congress the power to regulate commerce, not only with foreign nations, but among the several states, that power is necessarily exclusive whenever the subjects of it are national in their character, or admit only of one uniform system or plan of regulation. This was decided in the case of *Coolley v. Board of Wardens of the Port of Philadelphia*, 12 How. 299, 319, and was virtually involved in the case of *Gibbons v. Ogden*, 9 Wheat. 1, and has been confirmed in many subsequent cases, amongst others in *Brown v. Maryland*, 12 Wheat. 419; *The Passenger Cases*, 7 How. 283; *Orandall v. Nevada*, 6 Wall. 35, 42; *Ward v. Maryland*, 12 Wall. 418, 430; *State Freight Tax Cases*, 15 Wall. 232, 279; *Henderson v. Mayor of New York*, 92 U. S. 259, 272; *Railroad Co. v. Husen*, 95 U. S. 465, 469; *Mobile v. Kimball*, 102 U. S. 691, 697; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 203; *Wabash etc. R'y Co. v. Illinois*, 118 U. S. 557. 2. Another established doctrine of this court is, that where the power of Congress to regulate is exclusive, the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions; and any regulation of the subject by the states, except in matters of local concern only, as hereafter mentioned, is repugnant to such freedom. This was held by Mr. Justice Johnson in *Gibbons v. Ogden*, 9 Wheat. 1, 222, by Mr. Justice Grier in the *Passenger Cases*, 7 How. 283, 462, and has been affirmed in subsequent cases: *State Freight Tax Cases*, 15 Wall. 232, 279; *Railroad Co. v. Husen*, 95 U. S. 465, 469; *Welton v. Missouri*, 91 U. S. 275, 282; *Mobile v. Kimball*, 102 U. S. 691, 697; *Brown v. Houston*, 114 U. S. 622, 631; *Walling v. Michigan*, 116 U. S. 446, 455; *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34; *Wabash etc. R'y Co. v. Illinois*, 118 U. S. 557. 3. It is also an established principle, as already indicated, that the only way in which commerce between the states can be legitimately affected by state laws is, when, by virtue of its police power, and its jurisdiction over persons and property within its limits, a state provides for the security of the lives, limbs, health, and comfort of persons and the protection of property; or when it does those things which may otherwise incidentally affect commerce, such as the establishment and regulation of highways, canals, railroads, wharves, ferries, and other commercial facilities; the passage of inspection laws to secure the due quality and measure of products and commodities; the passage of laws to regulate or restrict the sale of articles deemed injurious to the health or morals of the community; the imposition of taxes upon persons residing within the state or belong-

ing to its population, and upon avocations and employments pursued therein, not directly connected with foreign or interstate commerce, or with some other employment or business exercised under authority of the constitution and laws of the United States; and the imposition of taxes upon all property within the state mingled with and forming part of the great mass of property therein. But in making such internal regulations, a state cannot impose taxes upon persons passing through the state, or coming into it merely for a temporary purpose, especially if connected with interstate or foreign commerce; nor can it impose such taxes upon property imported into the state from abroad or from another state, and not yet become part of the common mass of property therein; and no discrimination can be made, by any such regulations, adversely to the persons or property of other states; and no regulations can be made directly affecting interstate commerce. Any taxation or regulation of the latter character would be an unauthorized interference with the power given to Congress over the subject."

Among the state regulations incidentally affecting interstate commerce, which have been held to be enforceable and valid, on the ground that they were local rather than national in their scope and object, or related generally to the rights, duties, and liabilities of citizens, and affected the operations of foreign or interstate commerce only indirectly or remotely, are the following: Statutes creating liabilities for marine torts, and permitting their enforcement after the death of the person injured: *Sherlock v. Alling*, 93 U. S. 99; *Steamboat Co. v. Chase*, 16 Wall. 522; or prohibiting the floating of loose saw-logs in a navigable river within the state, "without the same being rafted or joined together or inclosed in boats, and under the control, supervision, and pilotage of men especially placed in charge of the same and actually thereon": *Craig v. Kline*, 65 Pa. St. 399. Other local regulations which are permitted to incidentally affect interstate and foreign commerce are mentioned in different parts of this note, the principal of which may be found under the headings, "Navigation—Rivers, Obstruction of," "Ferries," "Wharfage Fees," "Pilots and their Charges," "Regulation of Common Carriers," "The Police Power and Interstate Commerce," "Quarantine Laws," etc.

*New Subjects and Instrumentalities of Commerce.* — The power given to Congress to regulate commerce is not restricted to commerce and its instrumentalities existing at the time of the adoption of the constitution, but extends to all subjects of commerce and all means of carrying it on, whether known or anticipated when the constitution was adopted or not. Hence, though an invention is recent, yet if it, as in the case of the electric telegraph, becomes one of the instrumentalities of commerce, any state regulation of it, or of its use which amounts to a regulation of commerce, is prohibited: *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1; *Ratterman v. Western Union Tel. Co.*, 127 U. S. 411; *Western Union Tel. Co. v. Atlantic Tel. Co.*, 5 Nev. 102; *Yates v. Milwaukee*, 10 Wall. 497.

*What is Commerce.* — "Commerce undoubtedly is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse"; and it therefore includes navigation by or through which commerce is carried on between two or more states or with a foreign nation: *Gibbons v. Ogden*, 9 Wheat. 1; *Moor v. Pease*, 32 Me. 243; 52 Am. Dec. 655; *Pease v. Moor*, 14 How. 568. "Commerce is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including transportation, purchase, sale, and exchange of commodities between the citizens of our country and the citizens

or subjects of other countries, or between citizens of different states. The power to regulate it embraces all the instruments by which such commerce may be conducted": *Welton v. State of Missouri*, 91 U. S. 280. "Commerce is the interchange or mutual change of goods, productions, or property of any kind, between nations or individuals. Transportation is the means by which commerce is carried on; without transportation, there could be no commerce between nations or among states. Any regulation of the transportation of interstate commerce, whether it be upon the high seas, the lakes, the rivers, or upon railroads or other artificial channels of communication affecting commerce, operates as a regulation of commerce itself": *Council Bluffs v. Kansas City etc. R. R. Co.*, 45 Iowa, 338; 24 Am. Rep. 773. It is obvious that if the several states could regulate transportation or the other means by which commerce must be or is ordinarily carried on, they could thereby indirectly regulate commerce itself. Therefore no state regulation of the instrumentalities of interstate commerce is admissible. Hence a vessel engaged in navigation between different states, or telegraph or telephone companies employed in interstate commerce, are, except as to purely domestic commerce, not affected by state regulations unless local in their character, and such as must necessarily be included with the police powers of the state: *The Daniel Ball*, 10 Wall. 557; *Leloup v. Mobile*, 127 U. S. 640; *In re Pennsylvania Telephone Co.*, 48 N. J. Eq. 91; *ante*, p. 462.

*Commerce when Begins so as to Protect Subjects of.* — The fact that articles or a class of articles are proper subjects of interstate commerce, or that they are intended to be employed in such commerce, does not relieve them from the authority of the state to make regulations concerning them. When they begin to move from one state to another as articles of trade, then commerce commences: *The Daniel Ball*, 10 Wall. 557. If goods are in course of transportation through a state, though detained within it by some cause of delay, "they are in the course of commercial transportation, and are clearly under the protection of the constitution. There must be a point of time when they cease to be governed exclusively by the domestic law, and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be the legitimate one for this purpose, in which they commence their final movement for transportation from the state of their origin to that of their destination": *Oss v. Errol*, 116 U. S. 525. Until this moment arrives, they cannot be within the protection "of the national law of commercial regulation," though there is an intention to export them, and they have been brought from the place of their growth or manufacture to some point or station for the purpose of exporting them thence by railroad or some other means of transportation there available: *Oss v. Errol*, 116 U. S. 517; *Turpin v. Burgess*, 117 U. S. 504; *Turner v. Maryland*, 107 U. S. 38. If an article of commerce is such that the state, in the lawful exercise of its police powers, may prohibit its manufacture within the state, on the ground that it is injurious to the health or morals of its inhabitants, or for some other sufficient reason, the exercise of the police power cannot be avoided or invalidated by the claim, whether true or false, that the articles, if their manufacture is allowed by law, will become subjects of interstate commerce: *Beer Co. v. Massachusetts*, 97 U. S. 25; *Kansas v. Zelbott*, 123 U. S. 623; *Kidd v. Pearson*, 128 U. S. 1; *Powell v. Pennsylvania*, 127 U. S. 678.

*Commerce, Termination of Right of Subjects of, to Protection.* — While the commencement of transportation is also the commencement of the right of the articles transported to protection as articles of interstate commerce, the completion of such transportation does not terminate the right to such protection.

It is manifest that the right to regulate commerce as soon as the subjects of it reach a state, or place in the state, where their owners desire to sell or engage in traffic with them would be equivalent to a right to regulate commerce between states, and to impose regulations at variance with those imposed by Congress, or to enforce restrictions where Congress intended all should be free from restraint. Therefore, though an article is such that the state, in the exercise of its police powers, may forbid its manufacture in the state, or its sale if there manufactured, still if it is an article of commerce, the state has no power to impose any regulation or restriction which will prevent its being brought within the state, or its sale at any time after its arrival, and while it remains in original packages: *Leisy v. Hardin*, 135 U. S. 100; *Lyng v. Michigan*, 135 U. S. 161; *State v. Intoxicating Liquors*, 83 Me. 158. The protection to the importer ceases when he has so acted that the property imported becomes "incorporated and mixed up with the general mass of property in the country, which happens when the original package is no longer such in his hands": *Brown v. Maryland*, 12 Wheat. 419; *Low v. Austin*, 13 Wall. 29; *Keith v. State*, 91 Ala. 1. The only question remaining to be finally determined is, What is an original package, and the breaking thereof, within the meaning of these decisions? As to size or quantity, there can be no doubt that the importer may, in the absence of congressional legislation to the contrary, make it as large or small as to him may seem convenient or desirable for accomplishing the purpose he has in view of transporting his property from one state and making it a subject of sale or exchange in another.

*Original Packages.* — "Evidently the 'original package' referred to in these decisions was and is the package of the importer as it existed at the time of its transportation from one state into the other. The whole subject has relation to commerce and to interstate commerce, and to nothing else. Hence the words must mean the package as transported by the importer himself, or by his agent, either a common carrier or a private carrier, for the purposes of commerce; and therefore it would seem that it is for the importer to determine how large or how small the package should be, and the manner in which the package should be made up, and the materials used in making it up. Certainly an importer has as much right, under the federal constitution, to import into a state and sell against its laws a single gill of intoxicating liquor as he has to import into such state and sell against its laws a gallon or a barrel or a hogshead of the same interdicted article. In some cases of interstate commerce it would scarcely seem necessary that any package should be used. For instance, in the transportation of live-stock, the individual articles transported might be horses, cows, sheep, or hogs, and these articles might be very large or very small, even little pigs, and none of them placed in packages": *State v. Winters*, 44 Kan. 728.

An importer of articles of commerce from one state into another may, if he chooses, ship them in small boxes or bottles, and the smallness of the box or bottle cannot prevent it from being entitled to protection as an original package: *In re Beine*, 42 Fed. Rep. 545; *Keith v. State*, 91 Ala. 1. But he may, on the other hand, find it more convenient, or that his property is less liable to breakage or destruction, when he incloses two or more bottles or boxes within something, as with a cord, a paper wrapper, or a larger box. On what principle are the articles thus protected or united to be treated differently from the treatment applicable to them when they are shipped separately? If two or more bottles happen to be tied together with a cord, or inclosed in a paper or other wrapper, does the cutting of the cord or the



tearing of the wrapper deprive their owner of the protection of the constitution? And what is there in the language of the constitution to indicate that one transporting goods from one state to another should not be entitled to sell them by retail as well as by wholesale, or that his right to sell in either manner should be dependent on the form or size of the package in which he happens to ship them. We think that the use of the term "original package" was merely intended to furnish one of the tests by which it could easily be ascertained whether the articles in question were the same articles imported, and to assert that because they were still in such packages, they could not have been commingled with other articles, and were therefore undoubtedly still entitled to protection. But there is no reason why this test should be exclusive, nor have we seen any case in the national courts in which articles still in the possession and ownership of the importer have been denied protection because, when imported, they were boxed up or inclosed with other articles from which they have since been separated; but in some of the state courts, bottles of intoxicating liquors, which had they been shipped separately would have been treated as in original packages and entitled to protection, have been decided to have lost their immunity because taken out of the boxes in which they were shipped before being exposed for sale: *Smith v. State*, 54 Ark. 248; *Keith v. State*, 91 Ala. 2; *Wade v. State*, 63 Vt. 80.

*Navigation — Rivers, Obstruction of.* — While, as we have heretofore shown, the power to regulate commerce includes the power to regulate navigation, and, as a general rule, that any state regulation of navigation which affects interstate commerce is so far inoperative and void, still there are regulations of a local character which a state may lawfully enact and enforce, which indirectly affect navigation, and through it interstate commerce, and which are nevertheless upheld. Thus the construction and maintenance of a bridge across a navigable stream, while it tends to interfere with navigation, and to that extent to obstruct commerce, may aid transportation across the stream, and the advantage which it affords commerce may exceed the detriment to it arising from the obstructions to navigation. The local legislature, in the absence of any congressional action upon the subject, is permitted to determine whether commerce is best promoted by a bridge or not, and therefore any enactment by the state upon this subject is controlling, unless it conflicts with national legislation: *Gilman v. Philadelphia*, 3 Wall. 713; *Feane v. Moor*, 14 How. 568; *Willamette Iron Bridge v. Hatch*, 125 U. S. 1; *Beckwith v. Chicago*, 107 U. S. 678; *Cardwell v. American Bridge Co.*, 113 U. S. 206; *Hamilton v. Vicksburg R. R. Co.*, 119 U. S. 280; *Huss v. Glover*, 119 U. S. 543; *State v. Leighton*, 83 Me. 419. So there are instances where dams across navigable streams may promote rather than hinder commerce, as where by such dams the capacity of rivers for water carriage is increased. "In order to develop their greatest utility in that regard, it is often essential that such structures as dams, booms, piers, etc., should be used, which are substantially obstructions to general navigation, and more or less so to rafts and barges. But to the legislature of the state may be most appropriately confided the authority to authorize these structures where their use will do more good than harm, and to impose such regulations and limitations in their construction and use as will best reconcile and accommodate the interest of all concerned in the matter": *Pound v. Turck*, 95 U. S. 459.

When, however, Congress interposes to sanction or condemn an obstruction to navigation, its authority is paramount and its action conclusive. Hence, after it has authorized the maintenance of a bridge, it can no longer be pro-



ceeded against as unlawful, and when, on the other hand, it condemns a bridge or a particular class of bridges, or other obstructions, they can no longer be defended as innocent and lawful: *Newport & A. Bridge Co. v. United States*, 105 U. S. 471, 499; *The Clinton Bridge*, 10 Wall. 454; *Miller v. Mayor*, 109 U. S. 385. "The power to regulate commerce comprehends the control for that purpose, and to the extent necessary of all the navigable rivers of the United States which are accessible from a state other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress. This necessarily includes the power to keep these open and free from any obstruction to their navigation interposed by the states, or otherwise; to remove such obstructions where they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of the offenders. For these purposes Congress possesses all the powers which existed in the states before the adoption of the national constitution, and which have always existed in the Parliament of England": *South Carolina v. Georgia*, 93 U. S. 4; *Gilman v. Philadelphia*, 3 Wall. 724; *Thames Bank v. Lovell*, 18 Conn. 500; 46 Am. Dec. 332.

*Rivers, Improvements, Charging Tolls for Use of.* — The legislature of a state may authorize the improvement of a river within its limits by opening, widening, deepening, or straightening it, or changing its general course, and may authorize tolls to be charged all persons using it, as compensation for the advantage derived by them from its use in its improved condition: *Withers v. Buckley*, 20 How. 84; *Sands v. Manistee River Improvement Co.*, 123 U. S. 288; *Ruggles v. Improvement Co.*, 123 U. S. 297; *Hues v. Glover*, 119 U. S. 543; *McReynolds v. Smallhouse*, 8 Bush, 447; *Thames Bank v. Lovell*, 18 Conn. 500; 46 Am. Dec. 332; *Wisconsin R. etc. Co. v. Manson*, 43 Wis. 255; 28 Am. Rep. 542; *Carondelet Canal Co. v. Parker*, 29 La. Ann. 480; 29 Am. Rep. 339.

*Ferries.* — The earlier cases in the national courts indicate that the states have the right to grant ferry licenses, and the privilege of maintaining ferries over navigable waters within their limits, although the opposite shore on which the ferry must land is in another state, and that a license fee may be imposed on the keepers of ferries living in a state, for boats owned by them and used in ferrying passengers and goods from a landing in the state across a navigable stream to a landing in another state: *Carroll v. Campbell*, 17 S. W. Rep. 884; Mo., Dec. 1891; *The Lottawanna*, 21 Wall. 577; *Fanning v. Gregoire*, 16 How. 534; *Conway v. Taylor's Ex'rs*, 1 Black, 603; *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365. Nor do we understand the later decisions as denying "that the privilege of keeping a ferry, with a right to take tolls for passengers and freight, is a franchise grantable by the state, to be exercised within such limits and under such restrictions as may be required for the safety, comfort, and convenience of the public"; but they do make it clear that no taxes can be imposed upon the property used in the business of maintaining and operating a ferry between two or more states, the effect of which may be to regulate interstate commerce, and that such property is exempt "from charges other than such as are imposed by way of compensation for the use of the property employed, or for facilities afforded for its use, or as ordinary taxes upon the value of the property": *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196.

*Wharfage Fees.* — A city or state may have improved landings or erected wharves on a navigable stream or in a harbor. If so, it may charge for the use of such landing or wharf, and may declare that the compensation for such

use shall be proportionate to the size or tonnage of the vessel, and the regulation imposing and enforcing such compensation is not objectionable either as a regulation of commerce or as a tax on tonnage: *Worsley v. Second Municipality*, 9 Rob. (La.) 324; 41 Am. Dec. 333; *Sweeney v. Otis*, 37 La. Ann. 520; *Cincinnati etc. Co. v. Catlettsburg*, 105 U. S. 559. "A duty on tonnage is a charge for the privilege of entering or trading or lying in a port or harbor; wharfage is a charge for the use of a wharf"; and if a city owning a wharf adopts an ordinance whereby specific charges "for landing at or using it are imposed as and for wharfage," such charges cannot be avoided or the ordinance declared invalid on the ground that they are excessive, and "constitute but a duty on tonnage, in the name and under the pretext of wharfage." The intent of the legislative body imposing charges professedly for wharfage cannot be ascertained and thwarted by extrinsic evidence: *Parkersburg etc. Trans. Co. v. Parkersburg*, 107 U. S. 691; *Owachita P. Co. v. Aiken*, 121 U. S. 444; *Robbins v. Shelby Tax Dist.*, 120 U. S. 489. If, however, an ordinance or statute imposing wharfage discriminates between vessels laden with the products of different states, it cannot be sustained; as where vessels laden with the products of the state are exempt from charges to which vessels bearing the products of other states are subject: *Guy v. Baltimore*, 100 U. S. 434. With the exception that discriminations will not be allowed which might in themselves operate as regulations of interstate or of foreign commerce, "wharfage, the matter now under consideration, is governed by the local state laws; no act of Congress has been passed to regulate it. By the state laws it is generally required to be reasonable, and by those laws its reasonableness must be judged. If it does not violate them, as before said, the United States courts cannot interfere to prevent its exaction. Of course, neither a state nor any municipal corporation under its authority can lay duties on tonnage; for that is expressly forbidden by the constitution; but charges for wharfage may be graduated by the tonnage of the vessels using a wharf, and that this is not a duty on tonnage within the meaning of the constitution has been distinctly held in several cases": *Owachita P. Co. v. Aiken*, 121 U. S. 448.

*Tonnage, What Forbidden as a Charge upon.* — Although the decisions of the national courts sanction charges for wharfage, and the exaction of port charges for various services which may be rendered to vessels engaged in commerce, and receiving benefits from the facilities afforded to them by the erection of wharves and the like, it must not be forgotten that the national constitution declares that "no state shall, without the consent of Congress, lay any duty on tonnage," and that any state exaction which amounts to such a duty cannot be enforced. Any system of taxing vessels which, instead of taking their value as a basis of taxation, imposes a tax to be computed upon and according to their tonnage is unconstitutional: *State Tonnage Tax Cases*, 12 Wall. 204. Because the authorities show that where a vessel is chargeable with wharfage or for other services rendered to it such charge may be proportioned to its tonnage, it is often difficult to determine whether a charge to be ascertained from the tonnage of the vessel chargeable is invalid as an exaction of tonnage, or sustainable as a compensation due for services rendered. But if the charge attempted to be imposed is one which, by the terms of the statute or ordinance imposing it, may become due from the vessel, without any services being rendered to it, and from the mere fact that it has arrived in a port of the state, it is a charge on tonnage, and therefore not collectible. "It is perfectly clear that a duty or tax or burden imposed under the authority of the state, which is, by the law imposing it, to be measured by the

capacity of the vessel, and is, in its essence, a contribution claimed for the privilege of arriving or departing from a port of the United States, is within the prohibition": *Cannon v. New Orleans*, 20 Wall. 581; *Inman Steamship Co. v. Tinker*, 94 U. S. 238. Nor can an exaction be enforced on the ground that it is intended as wharfage, and entitles the vessel charged with it to the use of a wharf, if it is equally chargeable whether a wharf is used by it or not. "A tax which is, by its terms, due from all vessels arriving and stopping in a port, without regard to the place where they may stop, whether it be in the channel of a stream or out in a bay, or landed at a natural river bank, cannot be treated as compensation for the use of the wharf": *Cannon v. New Orleans*, 20 Wall. 581; *Inman Steamship Co. v. Tinker*, 94 U. S. 238. While the states have power to establish quarantine laws and regulations, and to provide the revenue necessary for their enforcement, this power must be exercised in subordination to the constitution of the United States, and the requisite revenue cannot be raised by charges imposed upon vessels, to be computed upon their respective tonnages: *Peete v. Morgan*, 19 Wall. 581. The essential test of a tax on tonnage "is, that it is imposed, whatever be the subject, solely according to the rule of weight, either as to capacity to carry or the actual weight of the thing itself": *Inman Steamship Co. v. Tinker*, 94 U. S. 238.

*Pilots and their Charges.* — That the regulation of pilots and pilotage is a regulation of commerce is conceded. "A pilot is as much a part of the commercial marine as is the hold of the ship and the helm by which it is guided"; and there is no doubt that Congress may, whenever it chooses, take full control of the matter of regulating pilots and pilotage; and a statute of a state will not be permitted to make any exaction or discrimination in conflict with the national legislation: *The Alameda*, 31 Fed. Rep. 366; *Freeman v. The Undaunted*, 37 Fed. Rep. 662. In the absence of any action on the part of Congress, each state has power to enforce regulations concerning pilots and pilotage in and approaching its harbors: *Cooley v. Board of Wardens*, 12 How. 299. Congress has sometimes expressly given its consent to such regulations, and at other times has made regulations of its own with respect to certain matters; but the decisions concur in declaring, that, except to the extent that Congress has acted, each state may act for itself: *Ex parte McNeil*, 13 Wall. 236; *Wilson v. McNamara*, 102 U. S. 572; *Sprague v. Thompson*, 118 U. S. 90. A statute, however, declaring that the master and port-wardens of a port within the state shall be entitled to demand and receive a specified sum, whether called upon to perform any service or not, from every vessel arriving in that port, has been held void, both as a regulation of commerce and as a duty on tonnage. This statute was thought to differ essentially from the statutes imposing charges for pilotage, because pilots are not by this statute allowed to recover compensation, except for services either performed or tendered, while the statutes declared void created a liability against vessels, whether services were performed or tendered, or not: *Steamship Co. v. Port-wardens*, 6 Wall. 31. A statute making it the duty of the master and wardens of a port to offer their services, and make a survey of the hatches of all sea-going vessels which should arrive at that port, and declaring that no persons other than such master or wardens, or their deputies, should make any such survey or any survey of damaged goods coming on board such vessels, or give certificates or orders for the sale of such goods at auction, was also adjudged to be void as a regulation both of foreign and interstate commerce: *Foster v. Master etc. of New Orleans*, 94 U. S. 246.

*Discriminations in Favor of the Products or Manufactures of the State.* —

One of the most natural attempts at the indirect regulation of commerce is to impose some restriction or prohibition, or to grant some privilege or exemption, which will probably or certainly especially encourage the manufactures or products of one state, or discourage the introduction, sale, or use of the products or manufactures of some other state. Instances of legislation of this character which have been held void include the following: Statutes prohibiting all persons from selling wine in the state, but excepting from their provisions persons who grow grapes or berries, and make wine therefrom, and sell it on the premises where such grapes or berries are grown, or in any other place where the sale of intoxicating liquors is licensed: *State v. Dechamp*, 53 Ark. 490; *Bogan v. State*, 84 Ala. 449; or imposing taxes on persons engaged in the business of selling liquors at wholesale, or taking orders for such liquors to be shipped into the state from any place out of the state not having their principal place of business in the state, and not imposing a like tax on persons engaged in a like business in reference to liquors manufactured within the state: *Walling v. Michigan*, 116 U. S. 446; or levying taxes on persons selling liquors not manufactured within the state: *Tiernan v. Rinker*, 102 U. S. 123; or requiring any person who shall sell or offer for sale the manufactured articles or machines of other states or territories, unless he be the owner thereof and taxed as a merchant, to take out a license, and to pay a specified sum therefor: *Webber v. Virginia*, 103 U. S. 344.

*Restrictions upon Transportation.* — State legislation may also attempt to discourage or prohibit the transportation of articles of commerce into, out of, or across the state in professed exercise of the police power, or upon some other ground supposed to be tenable. Of course, any such interference with transportation necessarily interferes with commerce. There may be circumstances which will justify it as an exercise of the police power, and whether and when this is so we shall consider hereafter. But it is generally true, that the police power of the states will not be suffered, without the permission of Congress, to interpose any restriction amounting to a regulation of commerce, either among the states or with a foreign nation. A statute imposing a tax or charge on the landing of passengers: *Henderson v. Mayor of New York*, 92 U. S. 259; *Ohj Lung v. Freeman*, 92 U. S. 275; *Smith v. Turner*, 7 How. 283; or a charge against persons or property going out of or coming within a state, or any prohibition against the arrival or departure of persons or property, or tending to prevent the receipt or sale of property while in the original packages in which it was imported, — is void, because it is an attempted regulation of commerce: *State v. Stilsing*, 52 N. J. L. 517; *Bowman v. Chicago & N. W. R'y*, 125 U. S. 465; *State v. Saunders*, 19 Kan. 127; *Bennett v. American Exp. Co.*, 83 Me. 236; 23 Am. St. Rep. 774; *State v. Intoxicating Liquors*, 83 Me. 158. Natural gas is an article of commerce, subject to purchase and sale, and to be transported from one place to another. A statute, therefore, declaring it to be unlawful for any person "to pipe or conduct natural gas from any point within this state to any point or place without this state," and that any person or corporation permitting such gas to be carried through its pipes to any place without the state, shall forfeit all right, title, and interest in and to the real property used or held for the purpose of mining for natural gas, is unconstitutional: *State v. Indiana etc. Co.*, 120 Ind. 575.

*The Regulation of Common Carriers* necessarily includes transportation, and therefore commerce; and when such regulation is undertaken by a state, its operation cannot extend to interstate commerce or commerce with a foreign nation. Therefore, a statute fixing rates for the transportation of freight or passengers: *Wabash etc. R'y v. Illinois*, 118 U. S. 557; *Hardy v. Atkinson etc.*

*R. R. Co.*, 32 Kan. 686; *State v. Chicago etc. R. R. Co.*, 40 Minn. 267; 12 Am. St. Rep. 790; *State v. Chicago etc. R. R. Co.*, 70 Iowa, 162; *S. C. R. R. Comm'r v. R. R. Co.*, 22 S. U. 220; *Commonwealth v. Housatonic R. R. Co.*, 143 Mass. 264; *Gulf etc. R'y v. Dwyer*, 75 Tex. 572; 16 Am. St. Rep. 926; or declaring that certain discriminations shall or shall not be made between certain classes of passengers: *Hall v. De Cuir*, 95 U. S. 485, — is invalid if construed as applying to interstate commerce, and is valid if restricted by its terms or by the decision of the state court to commerce transacted wholly within the state: *Railroad Commission Cases*, 116 U. S. 307; *Downham v. Alexandria Council* 10 Wall. 173; *Louisville etc. R. R. Co. v. Mississippi*, 133 U. S. 587. But it is said that “where the state legislature, without discrimination, passes a law which operates uniformly in aid of domestic and interstate trade alike, and Congress has not acted, or has not the authority to afford so complete a remedy for the evil as the state legislature, there can be no question about the validity of such legislation, or the duty of the state courts to enforce it,” and therefore, that a state may by statute impose a penalty upon all railway companies for a failure to ship freight within five days, though such statute operates alike upon freight to be shipped outside as well as inside the state: *Bagg v. Wilmington etc. R. R. Co.*, 109 N. C. 279; 26 Am. St. Rep. 569.

“A *Telegraph Company* occupies the same relation to commerce as a carrier of messages that a railroad company does as a carrier of goods. Both companies are instruments of commerce, and their business is commerce itself. They do their transportation in different ways, and their liabilities are in some respects different, but they are both indispensable to those engaged to any considerable extent in commercial pursuits”: *Telegraph Co. v. Texas*, 105 U. S. 464; *Pensacola T. Co. v. Western Union Tel. Co.*, 96 U. S. 1. Therefore, a state cannot tax each message sent out of the state: *Telegraph Co. v. Texas*, 105 U. S. 460; nor can it regulate “the transmission or delivery of interstate telegrams, even within its own borders.” “The whole subject of the transmission and delivery of interstate telegrams is, it seems, a subject national in its character and admits safely of only one uniform plan of regulation. But however it may be as to the regulation by a state of the transmission and delivery of such telegrams within its own boundaries, it seems certain that no power exists in a state to regulate the mode and order of transmission and delivery of interstate telegrams, starting from points within its own territory, after such telegrams have passed the state line and are within the boundaries of other states”: *Western Union Tel. Co. v. Pendleton*, 122 U. S. 355. “These principles are as applicable to messages by telephone as to merchandise. There can be no reasonable distinction between the office of common carrier of telephone and the office of a common carrier of goods by railway or steamboat”: *In re Pennsylvania Telephone Co.*, 48 N. J. Eq. 91; *ante*, p. 462.

*Taxes on Subjects of Commerce.* — A tax imposed upon the subjects of interstate or foreign commerce, or a license fee exacted of persons engaged in such commerce, might not merely discourage such commerce, but in extreme cases be equivalent to its prohibition. “The power to tax includes the power to destroy,” and therefore the taxation of interstate or foreign commerce without restriction cannot be conceded without at the same time conceding the power to destroy it. Doubtless every form of taxation directly imposed upon interstate or foreign commerce, or its instrumentalities or operations, is prohibited to the states, and the only question is, how far it may be incidentally imposed without falling within the inhibition implied from the exclusive power of Congress to regulate such commerce. A tax cannot be laid by a

state on the amount of sales made by auctioneers, and requiring the sum payable to be greater in the case of articles grown or manufactured in other states than upon articles which are grown or manufactured in the state wherein they are sold: *Oock v. Pennsylvania*, 97 U. S. 566; nor upon passengers departing from (*Crandall v. Nevada*, 6 Wall. 35) or coming within the state: *People v. Compagnie Generale*, 107 U. S. 59; *Henderson v. Mayor of New York*, 92 U. S. 259; whether aliens or not; nor upon messages sent by a telegraph or telephone corporation out of the state or received within the state from another state: *Batterman v. Western Union Tel. Co.*, 127 U. S. 411; *Leloup v. Port of Mobile*, 127 U. S. 640; *In re Pennsylvania Telephone Co.*, 48 N. J. Eq. 91; *ante*, p. 462; nor can a statute imposing a tax upon the gross receipts of persons or corporations engaged in transportation be enforced against a corporation engaged in interstate commerce. If a railroad corporation transports goods from one portion of a state to another, but in so doing necessarily passes through part of another state, it is not engaged in interstate commerce, and a state tax levied upon such transportation is not invalid: *Lehigh Valley R. R. Co. v. Pennsylvania*, 145 U. S. 192.

*Taxes, when may be Levied on Subjects or Instrumentalities of Commerce.* — On the other hand, it is no objection to a tax that it may fall upon subjects of interstate commerce, or affect persons engaged in such commerce, if these results are incidental, and do not flow from apparent attempts to regulate commerce or the persons transacting it, but from the fact that such subjects or persons are affected in the same way or to the same extent as other persons or subjects are affected. A tax upon all the sales of goods made within a state is valid, and may be enforced against persons who have sold goods imported from other states or territories, though such goods remain in the original packages in which they were imported, though such taxes are not enforceable against the importers themselves in making the first sale after importation: *Woodruff v. Parham*, 8 Wall. 123; *Waring v. Mayor*, 8 Wall. 110; *Hinson v. Lott*, 8 Wall. 148. A tax may be levied on all peddlers of sewing-machines, and one cannot escape such tax by proving that the machines which he sells were manufactured in another state: *Machine Co. v. Gage*, 100 U. S. 676. If a man has moneys on hand on the day when they are assessed, he cannot escape taxation on the ground that he uses his capital in interstate or foreign commerce by investing it in cotton for exportation to foreign countries: *People v. Commissioners*, 104 U. S. 466. The owners of property are not entitled to have it exempted from state or local taxation because of its employment in interstate commerce: *Delaware Railroad Tax*, 18 Wall. 206; *Horn S. M. Co. v. New York*, 143 U. S. 205. Taxes may be imposed on railroads though established by Congress: *Railroad Co. v. Peniston*, 18 Wall. 5; though not on franchises granted to such railroads by the United States: *California v. Central Pacific R. R. Co.*, 127 U. S. 1. "It is well settled that there is nothing in the constitution or laws of the United States which prevents a state from taxing personal property employed in interstate or foreign commerce, like other personal property within its jurisdiction. Ships or vessels, indeed, engaged in interstate or foreign commerce upon the high seas, or other waters which are a common highway, and having their home port at which they are registered under the laws of the United States at the domicile of their owners in one state, are not subject to taxation in another state at whose ports they incidentally and temporarily touch for the purpose of delivering or receiving passengers or freight. But that is because they are not, in any proper sense, abiding within its limits, and have no continuous presence or actual situs within its jurisdiction, and therefore can be taxed only



at their legal situs, their home port and the domicile of their owners: *Pullman Car Co. v. Pennsylvania*, 141 U. S. 23. In other words, property employed in interstate commerce is subject to taxation by the states, though there may be some difficulty in determining in what state it may be taxed, or the extent to which it may be taxed in several different states. The business in which it is employed makes necessary its frequent passage from one state to another, so that during each fiscal year it may be at different times in several states, or even in all the states of the Union. To tax it in each state might paralyze interstate commerce, and to altogether exempt it from taxation would be to exempt from the burdens of local government vast amounts of property well able to share such burdens, and constantly in need and receipt of protection afforded by the state and municipal governments, and paid for out of the fruits of state and municipal taxation. A subject of commerce, or an instrumentality of carrying it on, is not liable to taxation in the state from the mere fact that it happens to pass through, or even to rest for a short time therein, while in process of transportation: *State Freight Tax Cases*, 15 Wall. 232. But as to those instrumentalities of commerce which are constantly passing from state to state, whether they are wholly taxable in one state or not, some system may be employed which will subject them to taxation in the states through which they pass, so far as may be just under the circumstances. Thus, if a sleeping-car corporation is engaged in running its cars in, through, and out of a state, and has at all times a number of such cars within its territory, it is subject to a statute applicable to all corporations engaged in the transportation of freight or passengers, and requiring them to pay taxes based upon an assessment, the basis of which is, "such proportion of the capital stock of the company as the number of miles over which it ran cars within the state bore to the whole number of miles in that and other states over which its cars were run. This was a just and equitable method of assessment, and if it were adopted by all the states through which these cars ran, the company would be assessed upon the full amount of its capital stock, and no more": *Pullman Car Co. v. Pennsylvania*, 141 U. S. 23; *Pullman Car Co. v. Hayward*, 141 U. S. 36; *State v. Pullman Car Co.*, 64 Wis. 89. So a state may impose taxes upon each corporation doing business within the state, for the privilege of there exercising its franchise, to be determined, when the corporation is engaged in transportation, by the gross amount of its receipts, and that when the corporation is doing business partly within and partly without the state, the tax should be equal to the proportion of the gross receipts of the state, to be ascertained as follows: "The gross transportation receipts of such railroad line or system, as the case may be, over its whole extent within and without the state, shall be divided by the number of miles operated, to obtain the average gross receipts per mile, and the gross receipts in this state shall be taken to be the average gross receipts per mile multiplied by the number of miles operated in this state." This statute was sustained, on the ground that it was not a tax upon interstate commerce, and that the means adopted were intended solely for the purpose of determining the amount of business transacted within the state, and of levying a tax thereon: *Maine v. Grand Trunk Ry Co.*, 142 U. S. 217.

*Licenses Which State may Exact.* — The principles to which we have referred as applicable to taxation are equally applicable to license fees exacted for the privilege of doing business within a state. A state may exact a license fee from persons carrying on business within its territory, without rendering its action in so doing subject to the objection that it is attempting to regulate interstate or foreign commerce, provided it does not discriminate in favor of



its people, products, or manufactures, nor charge persons importing articles of commerce within the state for the privilege of there disposing of them. "No doubt can be entertained of the right of a state legislature to tax trades, professions, or occupations, in the absence of inhibitions in the state constitution in that regard; and where a resident citizen engages in general business subject to a particular tax, the fact that the business done chances to consist, for the time being, wholly or partly in negotiating sales between resident and non-resident merchants of goods situated in another state, does not involve the taxation of interstate commerce, forbidden by the constitution": *Ficklen v. Shelby Co.*, 145 U. S. 1. A license tax may be exacted of persons buying and selling on commission or otherwise doing business within the state, and estimated, when they have no capital invested, on their gross yearly commissions or charges, though the business transacted by them was for principals residing in other states, and the goods sold by them for such principals were to be shipped into the state in which the brokers did business: *Ficklen v. Shelby Co.*, 145 U. S. 1. A tax imposed on merchants and other dealers, of one tenth of one per cent of their purchases, whether made within or without the state, except on purchases of farm products from the producer, has been sustained, on the ground that such tax was a valid license or occupation tax for the privilege of doing business within the state: *State v. French*, 109 N. C. 722; 26 Am. St. Rep. 590; *State v. Stevenson*, 109 N. C. 730; 26 Am. St. Rep. 595. So a tax may be imposed on the keepers of ferries, "although their boats ply between landings lying in two different states": *Wiggins F. Co. v. East St. Louis*, 107 U. S. 365. One who has imported goods from another state or a foreign country has, while they remain in the original packages, a right to sell them, and no state can require that he, as a condition precedent to the exercise of this right, shall take out any license or pay any license fee or other charge: *Brown v. Maryland*, 12 Wheat. 441, 442. It appears equally certain that such importers need not make their sales in person, and that no license may be exacted of persons whom they may employ to effect sales for them. Therefore a statute declaring that all drummers or persons not having a place of business in the taxing district, offering for sale or selling goods therein by sample, shall be required to pay a specific sum per week or month for that privilege cannot be enforced against one who was employed and acting for merchants doing business in another state, and for whom he exhibited samples for the purpose of effecting sales: *Robbins v. Shelby, Taxing Dist.*, 120 U. S. 489; *Corson v. Maryland*, 120 U. S. 502. So one who is acting as agent in one state of a line of railroad between points in two other states, for the purpose of inducing persons going from the point at which he acted as such agent to points in other states to take the road which he represented, but not selling tickets for the road nor receiving or disposing of moneys on account of it, is engaged in interstate commerce, and cannot be required to pay a license tax: *Norfolk etc. R. R. Co. v. Pennsylvania*, 136 U. S. 114; *McCall v. California*, 136 U. S. 104. We are not sure that we apprehend the distinction between the cases of the class last cited and *Ficklen v. Shelby Co.*, 145 U. S. 1, but probably it is this, that a license tax imposed by a state upon an occupation may be enforced against persons engaged in that occupation and having the right under the license to transact all business falling within the line of their occupation, whether domestic, interstate, or foreign, though they, as a matter of fact, do not transact any business whatever, except such as constitutes interstate or foreign commerce, but that if they are employed by a person engaged solely in interstate or foreign commerce, and represent him to the extent that taxes upon them necessarily oper-

as taxes upon him and his transactions, then they cannot be required to take out and pay for a state or local license: *McLaughlin v. South Bend*, 128 Ind. 471; *Asher v. Texas*, 128 U. S. 129; *Stoutenburgh v. Hennick*, 129 U. S. 141; *State v. Agee*, 83 Ala. 110; *Fort Scott v. Pelton*, 39 Kan. 764; *Fechheimer v. Louisville*, 84 Ky. 306; *State v. Bracco*, 103 N. C. 349; *Simmons Co. v. McGuire*, 39 La. Ann. 848; *Ex parte Rosenblatt*, 19 Nev. 439; *Ex parte Thomas*, 71 Cal. 204; *Corson v. Maryland*, 120 U. S. 502; *Crutcher v. Kentucky*, 141 U. S. 47.

**Licenses, Discrimination in Favor of State Products.** — Of course any system of license taxes which discriminates between the products or manufactures of different states: *Welton v. Missouri*, 91 U. S. 275; *Tiernan v. Rinker*, 102 U. S. 123; *Webber v. Virginia*, 103 U. S. 344; *Walling v. Michigan*, 116 U. S. 446; or gives a citizen or resident of the state a right to carry on commerce on more favorable terms than are accorded to citizens of other states, — cannot be sustained: *Ward v. Maryland*, 12 Wall. 418; *State v. Wiggin*, 64 N. H. 508. A statute imposing a license tax upon peddlers of articles manufactured outside of the state is invalid, because it is an attempted discrimination in favor of the manufactures of the state: *Welton v. Missouri*, 91 U. S. 275; *State v. Pratt*, 59 Vt. 590; *Rodgers v. McCoy*, 6 Dak. 238; *Wrought Iron Co. v. Johnson*, 84 Ga. 754; *Marshalltown v. Blum*, 58 Iowa, 184; 43 Am. Rep. 115; *Vines v. State*, 67 Ala. 73; *State v. Browning*, 62 Mo. 591; but a license tax may be imposed upon all peddlers, or upon peddlers of a particular class of goods, and when imposed, no peddler can escape from its payment on the ground that the articles he happens to sell were wholly or partly manufactured or produced in another state: *State v. Emert*, 103 Mo. 241; 23 Am. St. Rep. 874; *State v. Smithson*, 106 Mo. 149; *Ex parte Butin*, 28 Tex. App. 304; and it has been held that a state may prohibit all sales by peddling within its limits: *Commonwealth v. Gardner*, 183 Pa. St. 284; 19 Am. St. Rep. 645.

**License Fee Exacted of Interstate Commerce.** — A state cannot first declare that the carrying on of some portion of interstate commerce is a privilege, and then impose a license tax for the exercise of such privilege. It is obvious that to do this is equivalent to the power to tax all interstate commerce out of existence. Therefore a statute imposing a license tax on each sleeping-car not owned by the road upon which it is run within the state is unconstitutional: *Pickard v. Pullman Car Co.*, 117 U. S. 34; *Tennessee v. Pullman Car Co.*, 117 U. S. 51. A license tax cannot be imposed upon persons owning and running tow-boats to and from the Gulf of Mexico and the city of New Orleans, because to permit its imposition might enable the state to regulate interstate commerce, and the license fee is in effect a charge upon "the price of the privilege of navigating the Mississippi River between New Orleans and the gulf, in the coastwise trade": *Moran v. New Orleans*, 112 U. S. 74.

According to the ordinary course of business, a bill of lading "is invariably associated with every cargo of merchandise exported to a foreign country, and consequently a duty upon that is, in substance and effect, a duty upon the article imported." A statute imposing a stamp duty on bills of lading for gold or silver transported from a port within to a port without the state is therefore void: *Almy v. California*, 24 How. 169. If a statute of a state imposes an excise tax upon tobacco, but exempts from such tax tobacco intended for export, and requires every package intended for export to have affixed to it an engraved stamp indicative of such intention, and allows the sum of twenty-five cents to be charged for affixing each of such stamps, such statute merely provides a mode of identifying the articles intended for export, and of securing their exemption from the tax to which they would otherwise

be liable, and is therefore constitutional: *Pace v. Burgess*, 92 U. S. 372; *Furpin v. Burgess*, 117 U. S. 504; *Coe v. Errol*, 116 U. S. 517.

**Corporations.** — In the note to *State v. Goodwill*, 25 Am. St. Rep. 573, we considered the right of a state to discriminate against corporations formed in other states, and reached the conclusion that a state might exclude them from doing business within its territory, or impose upon them such restrictions as it thought proper: See also *Pembina M. Co. v. Pennsylvania*, 125 U. S. 181; *Pacific M. Co. v. Seibert*, 142 U. S. 339. From this general rule must be excepted corporations formed for the purpose of engaging in interstate commerce. The state has no power to prevent their doing such business within its territory, nor can it impose upon them restrictions or obligations beyond its power to impose upon natural persons engaged in the same business under like circumstances: *Pensacola T. Co. v. Western Union Tel. Co.*, 95 U. S. 1; *Cooper Mfg. Co. v. Ferguson*, 118 U. S. 727; *Paul v. Virginia*, 8 Wall. 183; *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530; *Leloup v. Mobile*, 127 U. S. 640; *Norfolk & W. R. R. v. Pennsylvania*, 136 U. S. 114.

**The Police Power and Interstate Commerce.** — The implied prohibition against the regulation of interstate and foreign commerce by any state, like most other constitutional inhibitions, cannot be properly considered without remembering the police power vested in the several states, though the more recent decisions of the national courts affirm that no exercise of this power can be sustained which results in the regulation of such commerce: *Railroad Co. v. Husen*, 95 U. S. 465; *Minnesota v. Barber*, 136 U. S. 313; *Brimmer v. Rebmam*, 133 U. S. 78; *Bowman v. Chicago*, 125 U. S. 460; *Leisy v. Hardin*, 135 U. S. 100. "By the settled doctrines of this court, the police power extends, at least, to the protection of the lives, the health, and the property of the community against the injurious exercise by any citizen of his own rights. State legislation, strictly and legitimately for police purposes, does not, in the sense of the constitution, necessarily intrench upon any authority which has been confided, expressly or by implication, to the national government": *Patterson v. Kentucky*, 97 U. S. 504; *License Cases*, 5 How. 583. "But it does not follow that everything which the legislature of a state may deem essential for the good order of society and the well-being of its citizens can be set up against the exclusive power of Congress to regulate the operations of foreign and interstate commerce. We have lately expressly decided in the case of *Leisy v. Hardin*, 135 U. S. 100, that a state law prohibiting the sale of intoxicating liquors is void when it comes in conflict with the express or implied regulation of interstate commerce by Congress, declaring that the traffic in such liquors as articles of merchandise between the states shall be free. There are, undoubtedly, many things which in their nature are so deleterious or injurious to the lives and health of the people as to lose all benefit of protection as articles or things of commerce, or to be able to claim it only in a modified way. Such things are properly subject to the police power of the state. Chief Justice Marshall, in *Brown v. Maryland*, 12 Wheat. 419, 443, instances gunpowder as clearly subject to the exercise of the police power in regard to its removal and the place of its storage; and he adds: 'The removal or destruction of infectious or unsound articles is, undoubtedly, an exercise of that power, and forms an express exception to the prohibition we are considering. Indeed, the laws of the United States expressly sanction the health laws of a state.' Chief Justice Taney, in the *License Cases*, 5 How. 504, 576, took the same distinction when he said: 'It has, indeed, been suggested, that if a state deems the traffic in ardent spirits to be injurious to its citizens, and calculated to introduce

immorality, vice, and pauperism into the state, it may constitutionally refuse to permit its importation, notwithstanding the laws of Congress; and that a state may do this upon the same principles that it may resist and prevent the introduction of disease, pestilence, and pauperism from abroad. But it must be remembered that disease, pestilence, and pauperism are not subjects of commerce, although sometimes among its attendant evils. They are not things to be regulated and trafficked in, but to be prevented, as far as human foresight or human means can guard against them. But spirits and distilled liquors are universally admitted to be subjects of ownership and property, and are therefore subjects of exchange, barter, and traffic, like any other commodity in which a right of property exists.' But whilst it is only such things as are clearly injurious to the lives and health of the people that are placed beyond the protection of the commercial power of Congress, yet when that power, or some other exclusive power of the federal government, is not in question, the police power of the state extends to almost everything within its borders, — to the suppression of nuisances; to the prohibition of manufactures deemed injurious to the public health; to the prohibition of intoxicating drinks, their manufacture or sale; to the prohibition of lotteries, gambling, horse-racing, or anything else that the legislature may deem opposed to the public welfare: *Bartmeyer v. Iowa*, 18 Wall. 129; *Beer Company v. Massachusetts*, 97 U. S. 25; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659; *Stone v. Mississippi*, 101 U. S. 814; *Foster v. Kansas*, 112 U. S. 201; *Mugler v. Kansas*, 123 U. S. 623; *Powell v. Pennsylvania*, 127 U. S. 678; *Kidd v. Pearson*, 128 U. S. 1; *Kimmish v. Ball*, 129 U. S. 217. It is also within the undoubted province of the state legislature to make regulations with regard to the speed of railroad trains in the neighborhood of cities and towns; with regard to the precautions to be taken in the approach of such trains to bridges, tunnels, deep cuts, and sharp curves; and generally, with regard to all operations in which the lives and health of the people may be endangered, even though such regulations affect to some extent the operations of interstate commerce. Such regulations are eminently local in their character, and in the absence of congressional regulations over the same subject, are free from all constitutional objections, and unquestionably valid": *Crutcher v. Kentucky*, 141 U. S. 59.

One of the undoubted subjects of the police power is the protection of the public from imposition and fraud, and a state may, therefore, in the exercise of that power, ordinarily provide against the manufacture or sale of adulterated articles of food, or articles manufactured and put up in such a form as to impose upon purchasers, and lead them to believe they are purchasing a different article from that in fact sold to them. Principally, upon this ground, statutes prohibiting the manufacture and sale of oleomargarine have been sustained by the national courts; but in the case in which the question was presented, the court did not consider whether such a statute might not be objectionable as a regulation of interstate commerce: *Powell v. Pennsylvania*, 127 U. S. 678. In two states in which the question has arisen, their courts have affirmed the power of the state to protect the public against deception, and have therefore denied the right to sell oleomargarine when in such a form as to deceive purchasers into the belief that it was butter, though it had been imported from another state and remained in the original packages: *Commonwealth v. Huntley*, 30 N. E. Rep. 1127 (Mass., May 2, 1892); *Waterbury v. Newton*, 50 N. J. L. 534; *contra*, *State v. Gooch*, 44 Fed. Rep. 276.

*Inspection Laws.* — Some of the states have, from time to time, passed inspection laws, the purpose of which generally was to prepare products of the

state for exportation, and to this extent the validity of inspection laws has not been seriously contested, and when contested, has been affirmed: *Turner v. Maryland*, 107 U. S. 33. Perhaps there may also be state inspection laws applicable to property imported into the state, but if so, they must apply to all property of the same class, and not subject to inspection the products or manufactures of other states, while those of the state are exempt: *Volpe v. Wright*, 141 U. S. 62. A statute of Kentucky required the gauging and inspection of all oils and fluids, the products of coal, petroleum, or other bituminous substances intended for use for illuminating purposes, and provided that such oils as ignite or permanently burn at a less temperature than 130 degrees Fahrenheit should be condemned as unsafe for such purposes, and the casks or barrels in which they were contained should be branded as unsafe, and all persons selling oils the casks or barrels of which were so branded should be subject to a penalty prescribed by the statute. A particular oil, the exclusive right to manufacture which was protected by letters patent, having been condemned, and notwithstanding the condemnation sold, a conviction of the vendor was sustained, on the ground that the statute was an ordinary police regulation providing a proper inspection for the purpose of determining whether articles were dangerous, and therefore unfit for use; and the court affirmed the general authority of each state to protect its citizens against the introduction within its limits of infected merchandise, paupers, convicts, or persons likely to become a public charge, or animals having contagious diseases, and "the necessity growing out of the fundamental conditions of civil society of upholding such state regulations enacted in good faith, and which had appropriate and direct connection with that protection to life, health, and property which each state owes to its citizens": *Patterson v. Kentucky*, 97 U. S. 501. No inspection law can be sustained if its operation must be to exclude from one state the products of another by imposing conditions with which it is not possible to comply without incurring such inconvenience or expense as no importer could afford to incur. Therefore, a statute providing that no fresh meats shall be sold within the state unless from animals inspected therein within twenty-four hours before being killed, or from animals slaughtered within a hundred miles from the place where their meat is exposed for sale, unless such meat is inspected, and a charge of one cent per pound is paid for such inspection, is invalid, because its practical operation must be to exclude from sale the flesh of all cattle, whether healthy or not, not killed within the state in the one case, or slaughtered within one hundred miles from the place of sale in the other: *Minnesota v. Barber*, 136 U. S. 313; *State v. Klein*, 126 Ind. 68; *Brimmer v. Rebman*, 138 U. S. 78.

*Health, Regulations to Secure and Protect.* — Regulations imposed in good faith by a state, for the purpose of promoting and better securing the health of its citizens and protecting them from contagion, may doubtless incidentally affect or regulate interstate or foreign commerce without being unconstitutional. This is one of the subjects upon which the local authorities may act, at least until Congress has taken some action. Thus a dam on a navigable stream "passing through a deep, level marsh" may be authorized by the state when "the value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved; measures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those reserved to the states": *Willson v. Blackbird Creek Marsh Co.*, 2 Pet. 245.

*The Enactment of Quarantine Laws* is confessedly "within the province of the states of the Union." Whether an enactment of this character can prevail against any act of Congress regulating commerce it has not yet been necessary to determine, but we have no doubt that the national courts will sustain and enforce national regulation of this subject, whenever it comes in conflict with any state regulation. A statute of Louisiana, requiring the examination of all vessels passing a certain quarantine station, and allowing the examining officer, for making the inspection and granting a certificate, certain fees, designated in the statute, was sustained, on the ground that "quarantine laws belong to that class of legislation which, whether passed with intent to regulate commerce or not, must be admitted to have that effect, and which is valid until displaced or contravened by some legislation of Congress." *Morgan etc. Co. v. Louisiana etc. Board of Health*, 118 U. S. 455.

Live-stock, forming part of the property of citizens of a state, may, as well as their owners, be liable to contract contagious diseases brought from other states or countries. May this property be protected by appropriate state regulations tending to exclude contagion, or at least to render its introduction into the state less probable? A state cannot prohibit the introduction within its lines of all cattle from certain other states during certain specified months during the year, for this is exclusion rather than protection, and is an indiscriminate condemnation of healthy as well as diseased cattle: *Hannibal & St. J. R. R. Co. v. Husen*, 95 U. S. 465; *Urton v. Sherlock*, 75 Mo. 247; *Saksenstein v. Mavis*, 91 Ill. 391. A different result would probably have been reached, had it been shown that all cattle coming from the localities named, "during the months mentioned, were infected with disease, or that such cattle were so generally infected that it would have been impossible to separate the healthy from the diseased"; and it is settled that there is no constitutional objection to a state statute making a person having in his possession Texas cattle liable for any damage accruing from their running at large, and thereby spreading the disease known as "Texas fever": *Kimmish v. Ball*, 129 U. S. 217.

*Regulations for the Observance of Common Carriers* may also be prescribed by the state, and enforced against persons and corporations engaged in interstate commerce, where they are intended merely to secure good and prompt service, and to diminish the danger to which passengers and others are exposed. Hence locomotive engineers may be required to pass examinations designed to test their competency for the duties which their employment devolves upon them, and to take out a license showing that they have successfully passed such examination, and to pay a reasonable charge for the services rendered in making the examination and issuing the license: *Smith v. Alabama*, 124 U. S. 465; *Dent v. West Virginia*, 129 U. S. 114; *Nashville etc. R. R. Co. v. Alabama*, 128 U. S. 96. On the ground that natural gas, under a high pressure, is dangerous, it has been held that a statute prohibiting its being subjected to a pressure of more than three hundred pounds to the square inch is valid, and may be enforced against a corporation subjecting gas to a greater pressure while being carried out of the state in pipes: *Jamieson v. Indiana etc. Co.*, 128 Ind. 555. Many other regulations of common carriers have been upheld by the state courts, though undoubtedly affecting commerce, of which the following are instances: Making railroads liable for fires started by sparks from their locomotives: *Smith v. Boston & M. R. R. Co.*, 63 N. H. 25; prescribing the times when ticket offices shall be open: *Hall v. S. O. R. R. Co.*, 25 S. C. 564; imposing a penalty for refusing to deliver freight: *Gulf etc. R. R. Co. v. Dwyer*, 75 Tex. 572; 16 Am. St. Rep.



926; requiring connecting railroads to transfer freight and passengers: *Council Bluffs v. Kansas etc. R. R. Co.*, 45 Iowa, 333; 24 Am. Rep. 773; or through-trains to stop within the state: *Chicago etc. R. R. Co. v. People*, 105 Ill. 657; or separate accommodations to be provided for white and colored persons, but not attempting to apply this rule to interstate passengers: *Louisville etc. R. R. Co. v. Mississippi*, 133 U. S. 587; 66 Miss. 662; 14 Am. St. Rep. 599; but a state statute undertaking to prescribe what accommodations shall be furnished for either freight or passengers is inapplicable to interstate commerce: *Stanley v. Wabash etc. R. R. Co.*, 100 Mo. 435.

*Statutes Forbidding the Manufacture or Sale of Intoxicating Liquors* within a state do not ordinarily directly interfere with interstate commerce, and when they do not, are sustainable: *Kidd v. Pearson*, 128 U. S. 1; *Mugler v. Kansas*, 123 U. S. 623. It was finally held by the supreme court of the United States, three justices dissenting, that a state could not, in the exercise of its police power, prevent the importing of intoxicating liquors from another state: *Bowman v. Chicago etc. R. R. Co.*, 125 U. S. 465; nor deny to the importer the right, after such importation, to sell them while in the original packages: *Leisy v. Hardin*, 135 U. S. 100. So great was the dissatisfaction created by this decision that Congress interposed, and by a statute, enacted August 8, 1890, subjected all fermented, distilled, or other intoxicating liquors imported into any state or territory to the operation and effect of the laws of such state or territory, enacted in the exercise of its police powers, to the same extent and in the same manner as though produced in such state or territory, and this congressional legislation has been pronounced constitutional: *In re Rahrer*, 140 U. S. 545. Before the enactment of this statute the supreme court of Pennsylvania had sustained a statute forbidding the sale of intoxicating liquors, though still in the original packages, to persons of known intemperate habits: *Commonwealth v. Zell*, 138 Pa. St. 615; *Commonwealth v. Swihart*, 138 Pa. St. 629; *Commonwealth v. Bickman*, 138 Pa. St. 639; *Commonwealth v. Silverman*, 138 Pa. St. 642; *Commonwealth v. Pendergast*, 138 Pa. St. 633.

*Commerce within the State.* — It seems proper to here remind the reader that as to that commerce which is neither interstate nor foreign, each state has complete control of so much of it as takes place within its territorial limits, or at least, that whenever state control is limited it must be by some constitutional inhibition different from any we have been considering. "We proceed to remark, that a glance at the commerce clause of the constitution discloses at once, what has often been a source of comment in this court and out of it, that the power to regulate there conferred on Congress is limited to commerce with foreign nations, commerce among the states, and commerce with the Indian tribes; and while bearing in mind the liberal construction that commerce with foreign nations means commerce between citizens of the United States and citizens and subjects of foreign nations, and that commerce among the states means commerce between individual citizens of different states, there still remains a very large amount of commerce, perhaps the largest, which, being trade or traffic between citizens of the same state, is beyond the control of Congress": *Trade-mark Cases*, 100 U. S. 82; *Meor v. Feasie*, 32 Me. 343; 52 Am. Dec. 655; affirmed, 14 How. 568.



**CARPENTER v. CARPENTER.**

[181 NEW YORK, 101.]

**Co-TENANCY — DUTY OF Co-TENANTS.** — A TENANT IN COMMON IN POSSESSION of the common property is bound to do nothing with a view to prejudicing the interests of his co-tenants, and therefore cannot buy in an outstanding title to the prejudice of their rights.

**Co-TENANCY — MORTGAGE SALE.** — A tenant in common of property which is subject to a mortgage, who procures it to be foreclosed, without any necessity and for the purpose of cutting off the interest of some of his co-tenants, and then purchasing at a foreclosure sale, will not be permitted to retain the benefit of his purchase, but will be decreed to hold it in trust for his co-tenants, to the extent of their respective interests.

**WILL — CONSTRUCTION OF DEVISE.** — A will stating, — 1. That the testator's homestead shall be reserved for those of his children who have no family, or, having a family, are destitute of a home and not able to work; 2. That all his other landed property is to be sold and the proceeds divided among his children; 3. That whatever other property he may be possessed of he gives to his wife, — does not give the wife the homestead, but it vests in his children.

**Co-TENANCY — PURCHASE BY Co-TENANT AT PARTITION SALE.** — Tenant in common bringing an action for partition and buying property at the partition sale will not be decreed to hold it in trust for his co-tenants. In instituting and prosecuting to judgment and sale a suit for partition, he does not violate any legal duty he owes to his co-tenants, though some of them are minors.

**ACTION** by the children of two of the deceased sons of James B. Carpenter, deceased, and the widow of one of those sons, against the surviving children of said Carpenter, to set aside and have declared void two foreclosures of mortgages, and one judgment in partition, and the sales and conveyances made thereunder. Said Carpenter left a will containing the following provisions: "4. The house in which I live and the lot on which it stands, as hereinafter described, shall be reserved for those of my children who have no family, and for those of my family who are destitute of a home and are not able to work. 5. All my other landed property to be sold or divided equally among my children as they all may think best, but nothing shall be done contrary to the wishes of their mother while she lives. 7. My wife is to have the use of all my money estate during her life. . . . All the money is to be equally divided among the children after their mother is done with it. 10. Whatever other property I may be possessed of at my decease, and which is not disposed of in the foregoing, I give to my wife at her free disposal."

*Josiah T. Marcan*, for the appellants.

*Oscar Friebis and Nathaniel C. Moak*, for the respondents.

**ANDREWS, J.** James S. Carpenter died April 19, 1880, leaving surviving him a widow and seven children, and also the children of a son, Smith S. Carpenter, who had died before him, all of whom were minors. Jesse L. Carpenter, another son of James S. Carpenter, died a few days after his father, leaving a widow and six children, two of full age and the others minors. James S. Carpenter left real estate of the value of sixty-five thousand dollars and over, and personal property of the value of about seventy-four thousand dollars. His real estate consisted of three parcels, viz., the Homestead farm of about forty-one acres, of the value of twenty-five thousand dollars, subject to a mortgage long past due, known as the Duryea mortgage, on which was unpaid four thousand dollars, with interest from November 1, 1879; the Downing farm of about seventy nine acres, of the value of forty thousand dollars, subject to a mortgage past due, known as the Downing mortgage, on which was unpaid five thousand dollars, with interest from November 1, 1879; and certain other real estate known as the Dock property.

He left a will, under which his real estate went to his children and their issue, one eighth to each child, and one eighth to the issue of his deceased child, subject to a provision for the occupation of the house and lot on the Homestead farm by certain members of his family. The use of his personal property was given to his widow for life, and after her death it was distributable among his children and their issue as in the case of the real estate. He appointed executors, among whom were his sons Coles A. Carpenter and Charles W. Carpenter, two of the defendants, who alone qualified. The executors managed and controlled the real estate from the time of the testator's death up to the time of the foreclosures to be mentioned.

The plaintiffs are the children of the testator's two sons, Smith S. Carpenter and Jesse L. Carpenter, and the widow of the latter, and the defendants are the widow and the six children of the testator, who survived him and are still living. The evidence clearly shows that soon after the death of the testator, the defendants entered into a scheme to obtain, through a foreclosure of the Duryea and Downing mortgages, title to the property covered thereby, for the purpose of cutting off the interest of the children of the deceased brothers therein. To this end, in September, 1880, they procured the holders of the mortgages to commence foreclosures, and under judgments

obtained in the foreclosure actions, the property was sold in March and April, 1881, and was bid in by one of the sisters for the amount due on the mortgages respectively, and costs; and immediately after the execution of the referee's deeds, the purchaser conveyed to the mother (now deceased) a life estate in the Homestead farm, and to each of her five brothers and sisters one-fifth part of the Homestead farm, and of the Downing farm in fee. Before conveying to her brothers and sisters, Sarah J. Osborn, the purchaser of the foreclosure sales, executed to the holder of the Downing mortgage a new mortgage on the lands covered by that mortgage, in payment of the mortgage foreclosed, and to her brothers Coles A. Carpenter and Charles W. Carpenter, as executors, a mortgage for five thousand dollars on the Homestead farm, to secure them for money advanced by them out of the estate of James S. Carpenter, to pay the holder of the Duryea mortgage the sum due on that mortgage, and the costs. It is unnecessary to state in much detail the facts tending to show that the foreclosure of the two mortgages mentioned was contrived by the defendants for the purpose of accomplishing the scheme for depriving the children of the two deceased brothers of their share in the inheritance.

The holders of the mortgages had made no demand of principal or interest on their securities. They had allowed them to stand for many years after they became due without seeking to enforce collection. The interest had been paid up to November 1, 1879, and the foreclosures were commenced in September, 1880. The mortgages were amply secured upon property worth many times their amount, and there is not the slightest reason to suppose that any measure would have been taken at the time by the mortgagees to foreclose the mortgages if they had not been prompted to do so by the defendants. The holder of the Duryea mortgage testified that he was approached by the defendant Coles A. Carpenter, one of the executors, who said: "He would like to have me foreclose the mortgage; that it would be a favor to them all, in order to settle up the affairs of the estate." The proof is less explicit as to how the foreclosure of the Downing mortgage was brought about, but the circumstances surrounding the transaction preclude any doubt that it was by the active intervention of the defendants.

The judgment in this case adjudges that the title to the Homestead farm and to the Downing farm, acquired by the

defendants under the foreclosure, and the deeds in severalty subsequently made, is held subject to a trust in favor of the plaintiffs, to the extent of a one-fourth interest in the property, and we are asked to reverse the judgment, on the ground that the defendants did nothing more than they had a legal right to do, for the purpose of disencumbering their shares of their father's estate of the mortgages, and separating their interests in the property.

It would be a matter to be regretted if we should be compelled, by any principle of law, to uphold a transaction so repugnant to every sentiment of honor, and which is instinctively condemned in the forum of conscience. We assent to the claim of the learned counsel for the defendants, that before a plaintiff can invoke the action of a court to give him redress of any sort, he must show that at some point in the history of his grievance a right, not ethical merely, but cognizable in the domain of law, has been violated, or that some trust duty owed toward him by some one has been actively or passively disregarded. But that a duty cognizable by the law has been violated in this case by the defendants cannot, we think, admit of doubt. It is probably true that neither the principal or interest of the mortgages was a charge upon or payable out of the personal estate of James S. Carpenter in the hands of his executors: 1 Rev. Stats., p. 749, sec. 4; and the general direction in the will to his executors, "to pay all just and legal demands against his estate," is insufficient to charge the personal estate with mortgage debts.

But the executors and the other defendants, together with the children of the two brothers deceased, were tenants in common of the real estate. The issue of the deceased brothers were also interested in the personal property of the testator, the extent of which interest could not be ascertained until an accounting by the executors. The executors took possession of and controlled the real estate from the death of the testator, and received the rents and profits from that time, and held them for the common benefit of all the parties interested. It appears that there were several tenement-houses on the Homestead lot; that the executors continued to work a clay-bed on the premises, selling material therefrom. It is claimed by the defendants that no rents or profits had been received up to the foreclosure out of which the interest on the mortgages could have been paid. The trial judge refused to find this to be true. The executors kept no account of the rents and profits.

They seem to have been handed over to the mother. In the absence of clear proof on the subject, a court, in view of the circumstances, is justified in assuming that the rents and profits of the realty were available and sufficient to have paid the comparatively small amount due for interest on the mortgages, and this clearly is all that the mortgagees, upon the facts shown, would, in any event, have required. The executors not only omitted to use the rents and profits for this purpose, or to pay their own share of the interest, but they also loaned the funds of the estate to pay one of the mortgages, for this was the substance of the arrangement in respect to the Duryea mortgage.

The transaction by which some of the tenants in common claim to have acquired the whole estate, to the exclusion of their co-tenants, cannot be upheld within the principle of many cases: *Van Horne v. Fonda*, 5 John. Ch. 388; *Knolls v. Barnhart*, 71 N. Y. 474; *Rothwell v. Dewees*, 2 Black, 613; *Dubois v. Campau*, 24 Mich. 381. The defendants and the plaintiffs had a community of interest in a common title arising under the devise. The defendants, or some of them, were in the actual possession and control of the common property. They were bound to do nothing with a view to prejudice the interests of the plaintiffs. They could not buy in an outstanding title to defeat the right of their co-tenants. If the foreclosure of the mortgages was a proceeding hostile to the defendants, and they had not been in default, and their purchase was made of necessity to protect their own rights, with full knowledge of the situation on the part of the plaintiffs, the moral, and perhaps the legal, aspect of the case would be altered. But to permit the plaintiffs, all but two of whom were infants, to be cut off by a proceeding instigated by the defendants for that very purpose, and in the absence of any effort on their part to avert the danger, and when they were in actual possession of the common property, receiving the rents and profits, is not a mere ethical grievance, but one which the law will recognize and redress. We think the judgment below, so far as it respects the Homestead and the Downing property, stands upon a firm, equitable, and legal foundation. The subordinate points as to the principle of the accounting are not, we think, well taken. Nor do we think that the widow of the testator took the Homestead under the will, but that that passed with the other "landed property" to the children and their issue,

subject only to the right of occupancy of the house-lot under the provision before referred to.

We are of opinion, however, that the general term erred in reversing the judgment of the special term as to the Dock property. The action for the partition of that property was brought a year later than the foreclosures. It was regularly prosecuted, all parties in interest having been joined in the action and served with process, and a sale made under the judgment. We think the evidence does not show that any legal duty was violated by the defendants in instituting the partition, or that they can be charged as trustees for the plaintiffs in respect of that property.

The result is, that the judgment of the general term, so far as it reverses the judgment of the special term, should be reversed, and that the judgment of the special term should in all things be affirmed, without costs to either party in this court.

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**CO-TENANCY — RIGHT OF CO-TENANT TO PURCHASE OUTSTANDING TITLE. —** A co-tenant, in possession under an agreement binding him to pay the taxes in lieu of paying rent on the premises, cannot, by allowing the property to be sold for unpaid taxes and redeeming therefrom, acquire any title as against his co-tenants. The title thus acquired inures to the benefit of them all: *Donnor v. Quarterman*, 90 Ala. 164; 24 Am. St. Rep. 778. The rule that one co-tenant cannot acquire title to the land of a co-tenant at a tax sale does not apply where prior to the sale he conveyed his interest to the purchaser: *Meikel v. Meikel*, 119 Ind. 421. One of several persons holding a common interest in an estate cannot purchase an encumbrance or outstanding title and set it up against the others for the purpose of depriving them of their interest: *Weaver v. Wible*, 25 Pa. St. 270; 64 Am. Dec. 696, and note; *Brittin v. Handy*, 20 Ark. 381; 73 Am. Dec. 497, and note; *Venerable v. Beauchamp*, 3 Dana, 321; 28 Am. Dec. 74, and extended note.

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## PEOPLE v. KANE.

[121 NEW YORK, 111.]

**CRIMINAL LAW. — THE CRIME OF UNLAWFULLY AND WILLFULLY DESTROYING THE PROPERTY OF ANOTHER** does not exist when the act of destruction was in the defense of the possession of property of the destroyer.

**CRIMINAL LAW. — THE OWNER OF PROPERTY HAS A RIGHT TO DEFEND ITS POSSESSION**, and if necessary, to destroy the means used to invade that possession.

**CRIMINAL LAW. — THE DESTRUCTION OF THE PERSONAL PROPERTY OF ANOTHER** is not criminal when it consists of a boat which the owner persists in keeping and fastening on a lake on the land of the destroyer, if such destruction is necessary in defense of the land-owner's possession of his land.

**PROSECUTION and conviction of the defendants on a charge of unlawfully and willfully destroying personal property.**

*Livingston Smith*, for the appellants.

*Benjamin H. Reeve*, for the respondent.

**GRAY, J.** The defendants were indicted and convicted, under section 654 of the Penal Code, for the unlawful and willful destruction of property. The property destroyed was a row-boat belonging to one Davis. There was no dispute as to the willful destruction of the property, and it occurred under these circumstances: Its owner had placed it upon the waters of a mill-pond, which was indisputably part of the property of one Edward Kane. Davis had been more than once notified by Kane that he must remove the boat; but he refused to do so. Kane then caused it to be removed from the waters of his pond, and to be placed upon Davis's land, which bordered upon this pond. Davis then put it back in the water. Kane again removed it and placed it on Davis's land; but Davis put it back, and this time chained it to a tree, to prevent its further removal by Kane. Kane, having gone to Europe about the time, had placed his son, one of these defendants, in the possession and care of his property, informing him of his efforts to keep Davis from putting his boat on the pond, and instructing him to see to it that Davis did not further trespass on their property. When Davis persisted in using the pond and put his boat back on its waters, the defendant Kane, as he testified, believing in his right and advised thereto by his lawyer, with the aid of the other defendant, broke up the boat. It was done openly and without any conflict or riotous disturbance. Thereupon this indictment followed. The trial judge having charged the jury, as a proposition of law, that the destruction of the boat was unlawful, upon the conclusion of his charge, the defendants requested of him to charge that "if Lewis S. Davis persisted in putting his boat upon the pond, against the wishes of H. E. Kane, he had a right to destroy the boat, if necessary, in defense of his possession."

"The Court: I decline to charge that as applicable to this case, because I have already charged you, gentlemen, that under the circumstances of this case there was nothing justifying the defendant in destroying this boat as he did. Of course, as a general proposition in the defense of property, if



a horse or any animal is trespassing upon your property, you have a right to use such force as may be necessary. So if a man attacks you upon your property, you have a right to defend your possession, and use such means as are necessary to its defense. But I instruct you, upon the evidence existing in this case, that the boat being there in the pond, even conceding the title of the pond to have been in Kane, that he had no right to actually break up and destroy the boat, and no right of property applicable to him justified him in so doing."

To this charge, and to the refusal to charge as requested, the defendants excepted, and their exception presents the one question for our consideration upon this appeal.

I presume that the trial judge, in so charging, must have interpreted the provisions of section 654 of the Penal Code to exclude any excusable cause for the destruction of property. I think he erred in his ruling, and in charging as he did. Under this section, in order to establish the offense charged, the elements of an unlawful and of a willful destruction of property must exist and be proved. Though a destruction of property may have been willful, whether it was unlawful may be a question which should be decided by the jury, upon the evidence showing the cause or motive. If it was intended that the act alone should constitute the crime, irrespective of the motive, then I do not think the legislature would, in enacting the section, have used the expression "unlawfully." It would have been sufficient to have said "willfully." To the presence of the word "unlawfully" in the section, I think we must give some importance and significance. It may be conceded that the intention with which the offense charged in the indictment was committed is not material to be proved by the people. They may rest upon giving proof of the destruction by the defendant of the property, as constituting an offense; but it is perfectly competent for the accused to give evidence in proof of a justification for his act, and then it becomes a question for the jury to decide, upon the evidence, whether there was excusable cause for the destruction of the property, or not. The intent to destroy undoubtedly existed; but if the jury should believe it to be shown by the evidence that the act was in defense of the possession of property, the criminality was lacking which constitutes the punishable offense against the people. That is claimed by the appellants to have been the case here, and there certainly was evidence upon which the jury might have found that they did the act in de-

sense of the possession of property. I cannot think that there is such a difference in principle between a case of assault and battery in defense of one's property and that of a destruction of property in the same cause, as that in the latter case it is always unlawful, and therefore punishable by the statute, while in the former it may be justifiable.

It has been frequently held that one who is owner and in possession of premises has a right to defend their possession, and that defense may justify an assault and battery: *Harrington v. People*, 6 Barb. 607, 612; *Filkins v. People*, 69 N. Y. 101, 106; 25 Am. Rep. 143.

In this case, it was shown by the evidence that Kane's efforts to prevent Davis from using his property, by placing his boat upon it, had been persistently opposed and defied. If it had been so flagrant a case as actually to obstruct a proper and rightful enjoyment and use of his property, was Kane bound to submit to it or to litigate the matter in the courts? I cannot think so. That in the particular case the trespass or obstruction may not have been such as to occasion the greatest inconvenience to the property owner is not a consideration which affects the question of the right. The ownership and possession of property confer a certain right to defend that possession, and I am unable to perceive wherein lies the essential difference in principle between a defense of it, which results in an assault and battery, and that which results in the destruction of the means used to invade and interfere with that possession. Whether the act done, in either case, was really in defense of one's possession, its character and notice present a question which should be submitted to the jury.

In refusing to allow the jury to take into consideration the circumstances of this case, and in instructing them that upon the evidence the defendant had no right to destroy the boat, and that no right of property justified him in so doing, I think the trial judge seriously erred, and that therefore there should be a reversal of the judgment below, and a new trial ordered.

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EARL, C. J., dissented. He claimed that the acts done by the defendants were precisely those described in the statute, and there made punishable as a crime; that it was not necessary for the defendants to have had a wicked or guilty intention or motive in what they did; that the statute was intended to prevent persons from taking the law into their own hands instead of having their disputes adjusted by "peaceful methods in the appropriate judicial tribunal"; and that the owner of the lake or pond on which the boat was unlawfully kept should have resorted to a suit in equity to protect his prop-

erty from repeated trespasses; and having an adequate remedy by such suit, there was no necessity and no sufficient excuse for the destruction of the boat.

**CRIMINAL LAW — REMOVING PROPERTY FROM ONE'S LAND.** — It is not trespass and one cannot be indicted for removing a fence, "unlawfully and without license," put upon his land by another, under a statute making it a misdemeanor "if any person shall unlawfully and willfully pull down, burn, destroy, injure, or remove any fence, wall, or other inclosure, or any part thereof, surrounding or about any yard, garden, cultivated field, or pasture": *State v. Headrick*, 3 Jones, 376; 67 Am. Dec. 249, and note.

**REAL PROPERTY — RIGHT OF OWNER TO DEFEND BY FORCE.** — A trespassing man or beast may be removed by force, but may not be destroyed or subjected to permanent injury or unnecessary force by the land-owner: *Jackson v. Patterson*, 14 Conn. 1; 35 Am. Dec. 96. A person having the legal title to land and in actual possession thereof has a right to repel by force any attempt to molest him in the enjoyment thereof, or the free use of anything pertaining thereto: *Tribble v. Frame*, 7 J. J. Marsh. 599; 23 Am. Dec. 430.

## ROSSEAU v. BLEAU.

[121 NEW YORK, 177.]

**CONVEYANCE DELIVERED AFTER THE DEATH OF THE GRANTOR** cannot affect his creditors, nor constitute any obstacle whatever to the enforcement of their debts in the usual and ordinary course of administration.

**FRAUDULENT CONVEYANCES.** — **EQUITY WILL NOT AID THE SUIT OF AN ADMINISTRATOR** to set aside a conveyance purporting to be made by his intestate, but not delivered in his lifetime, because such conveyance interposes no obstacle to the assertion of the rights of the creditors of the decedent, nor is it any cloud upon any right or interest which such creditors have.

**THE DELIVERY OF A CONVEYANCE TO AN ATTORNEY**, with instructions to him to deliver it to the grantee, has the effect, when such delivery is made, to divest the title of the grantor, and vest it in the grantee by relation as of the date of the delivery to the attorney.

**WITNESSES.** — **AN ATTORNEY AT LAW IS A COMPETENT WITNESS TO PROVE THAT HIS CLIENT DELIVERED A CONVEYANCE** to him to be delivered to the grantee therein. When the client commissioned the attorney to deliver the deed, he necessarily waived all objections to proof of that fact being made by the testimony of the attorney.

*John T. Norton*, for the appellants.

*H. D. Bailey*, for the respondent.

**O'BRIEN, J.** The plaintiff, as administrator of Mary Rosseau, who died on the 28th of October, 1888, brings this action, in behalf of her creditors, to set aside a deed of real estate made by the intestate in her lifetime, in which the defendant Jennie Bleau is named as the grantee, on the ground that the

instrument is fraudulent as against such creditors. The complaint alleges, and the trial court has found, that the deceased left no personal estate except a small sum of money, and that at the time of her death she was indebted to one of her relatives for care and attendance during her last sickness, in the sum of two hundred dollars. The trial court found that the deed was executed by Mary Rosseau on the sixth day of March, 1888, and recorded on the thirtieth day of October, 1888, but not delivered to the grantee named therein until two or three days after the death of the grantor. It was further found, as matter of fact and law, that the deed was fraudulent, and that the plaintiff, as the representative of creditors, was entitled to judgment setting it aside, and the general term has affirmed the judgment. Assuming that the plaintiff, under chapter 314 of the Laws of 1858, can maintain such an action as this upon proper allegations and proof, yet we think that, upon the facts found by the trial court, the judgment should have been in favor of the defendants. It having been found that the deed in question was not delivered till after the death of the grantor, it did not, so far as appears, become operative as a conveyance during her life, and it follows, therefore, that the plaintiff's intestate died seised of the lands described therein. The rights of creditors against the real estate of deceased persons attaches to the land as a statutory lien immediately upon the death of the owner, and of course their rights cannot be impaired by any conveyance which is delivered or takes effect subsequently: *Platt v. Platt*, 105 N. Y. 488.

The creditors represented by the plaintiff, therefore, had a lien upon the land prior to the time that any title could vest in the defendant, if any title vested in her at all. The deed constituted no obstacle whatever to the enforcement of their debts in the usual and ordinary course of administration. There was no need of invoking the aid of a court of equity to set aside the instrument, as it could not, upon the finding, be fraudulent as to creditors. Whatever the consideration or purpose of the conveyance was, it may be good, so far as appears against every one, so long as the rights of the creditors are protected by the statute, and the administrator had no standing to attack it. He has precisely the same right now to proceed against the land that he would have had if the deed had never been executed. Nor can the judgment be upheld upon the ground that it removes a cloud upon title. The

deed was not a cloud upon any right or interest that the creditors of the deceased had, and the statute confers no power upon an administrator to bring an action for that purpose.

The theory of the defendants was, that the grantor delivered the deed to the attorney who drew it, with instructions to him to deliver it to the grantee. If this was the fact, the legal effect of such delivery to a third person would be to divest the grantor of her title and transfer it to the grantee by relation as of the date of the delivery to such third person: *Munoz v. Wilson*, 111 N. Y. 295; *Hathaway v. Payne*, 34 N. Y. 92; *Craig v. Wright*, 36 Hun, 74.

On the trial the defendant, the grantee named in the deed, called the attorney who drew it at the request of the grantor, and attempted in various forms to prove these facts by him, and also that he acted as a mere scrivener in the preparation of the deed. The evidence was all objected to by the plaintiff, upon the ground, among others, that it was a privileged communication under section 835 of the code. The court excluded the evidence, and the defendants excepted. Before this section could have any application to the testimony offered, it was necessary to show that the relations of attorney and client existed between the witness and the deceased: *Renihan v. Denzin*, 103 N. Y. 579; 57 Am. Rep. 770. A part of the defendant's offer was to show that these relations did not exist at the time of the transaction sought to be proved. It was entirely competent to prove that when the defendant sought to prove by this witness the delivery of the deed to him by the grantor for the grantee, it did not appear that there was any such professional relations between the witness and the deceased as to warrant the court in excluding the testimony. But even if the relation of attorney and client had been shown to exist, the attorney was still a competent witness to prove the delivery of the deed to him for the purpose of delivering it to another. Such a communication from client to attorney is not within the prohibition of the section of the code above cited, and the attorney was always competent to prove it, as, from its very nature, it was not made in professional confidence nor intended to be confidential, but, on the contrary, imparted to another: *Hurlburt v. Hurlburt*, 128 N. Y. 420; 26 Am. St. Rep. 482.

It has never been held that a verbal message communicated from client to attorney to be delivered to a third person cannot be proved in behalf of the person to whom the message was sent by the testimony of the attorney. Moreover, the next

section of the code permits the client to waive the privilege when it exists, and then the testimony is competent. When the deceased commissioned the witness to deliver the deed to the grantee named therein, she necessarily waived all objections that she might otherwise make to proof of that fact by the attorney: *Matter of Coleman*, 111 N. Y. 220.

The finding of the court that the deed was not delivered till after the death of the grantor was, it is fair to assume, the result of excluding the testimony, and in this view its exclusion was probably more hurtful to the plaintiff, upon whose objection it was excluded, than to the defendant who offered it. However that may be in the aspect which the appeal has assumed here, the defendant had the right to give the evidence, and its exclusion was error. There are some other rulings appearing in the record that would be difficult to sustain, but as the judgment must be reversed for the reasons stated, it is not necessary to examine them.

The judgment should be reversed and a new trial granted, costs to abide the event.

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**DEEDS — DELIVERY AFTER DEATH OF GRANTOR.** — A deed is inoperative for want of delivery, if, after being signed and acknowledged by the grantor, it is given to an agent with instructions to deliver it in the event of the grantor's death, though after such death it is delivered as directed: *Weisinger v. Cook*, 67 Miss. 511; 19 Am. St. Rep. 320, and note; *Stone v. French*, 37 Kan. 145; 1 Am. St. Rep. 237, and note. Where a father executed a deed to two minor children, but retained it in his possession and continued to occupy the premises until his death, such delivery was insufficient: *Fain v. Smith*, 14 Or. 82; 58 Am. Rep. 281, and note; extended note to *Wellborn v. Weaver*, 63 Am. Dec. 243; extended note to *Jones v. Jones*, 16 Am. Dec. 89; *Sneathen v. Sneathen*, 104 Mo. 201; 24 Am. St. Rep. 326, and note; *Roth v. Michalis*, 126 Ill. 325.

**DEEDS — DELIVERY TO THIRD PERSON FOR GRANTEE — EFFECT OF.** — A deed takes effect only from its delivery, and this may be either to the grantee or to a third person, who has no special authority, for the use of the grantee: *Wellborn v. Weaver*, 17 Ga. 267; 63 Am. Dec. 235; *Chess v. Chess*, 1 Pen. & W. 32; 21 Am. Dec. 350; *Church v. Gilman*, 15 Wend. 656; 30 Am. Dec. 82.

## THOMAS v. THOMAS.

[181 NEW YORK, 205.]

**BENEFICIAL ASSOCIATIONS — CHANGE OF BENEFICIARY.** — The fact that one to whom a certificate of membership issued, in which his daughter was named as a beneficiary, subsequently married, and after his marriage inserted in the certificate the name of his wife as one of the beneficiaries, both he and his wife intending and believing that his doing so entitled her to be ranked as a beneficiary, does not have the effect of giving his wife any interest in the certificate, when it was issued subject to the by-laws of the order, which required any change of beneficiaries to be entered in the relief-fund certificate, or that such certificate be surrendered and a new certificate issued, payable to such person as the member might direct. This is not a case where equity can interfere to remedy a defective execution of a power.

*A. K. Potter*, for the appellant.

*W. C. Ely*, for the respondent.

**MAYNARD, J.** This action involves the question of title to a certificate of membership issued by the defendant, the Supreme Council of the Order of Chosen Friends, an Indiana assessment insurance corporation, to David H. Thomas, April 28, 1881, insuring the life of Thomas in the sum of three thousand dollars, to be paid at his death to the plaintiff, Sarah A. Thomas, his only minor child, then living with him, and of the age of about seven years. Thomas was a widower when the certificate was issued, and on June 1, 1882, intermarried with the defendant, Mary E. Thomas. He died January 24, 1887. The certificate, as issued, designated the payee as follows: "Which sum shall, in case of death, be paid to my daughter, Sarah Ann Thomas." A few days after his marriage, without the knowledge of the insurance company, Thomas inserted in the certificate, in a blank space after the words above quoted, the following: "And my wife Mary Elizabeth Thomas,"—thus attempting to make her a joint payee and beneficiary thereof with his daughter.

The trial court has found, and upon what appears to be sufficient evidence, that this insertion by him of the name of his wife was in consideration of the marriage and of love and affection, and for the purpose of changing, and with the intent to change, the beneficiary named in the certificate, so that his wife should have an equal part and share with his daughter in its benefits; that he thereupon delivered the certificate to his wife, and that she, for a like consideration and with like purpose and intent, took and received it from him; that Thomas



supposed and believed that he had thereby revoked and changed and done everything necessary and proper to be done to effect the revocation and change of the beneficiary originally named on the certificate, and for the substitution in place thereof of his wife as the joint and equal beneficiary with his daughter herein, and had effected such substitution; and that the wife, at the time of the receipt of the certificate, believed, and has always since believed, that no further act or thing was necessary or remained to be done to entitle her to participate in the moneys to be derived from the certificate, and in the benefits secured thereby. There was an independent finding that after the issuing of the certificate to him, Thomas, for a certain good and valuable consideration, and for love and affection, duly transferred to his wife, and gave and delivered to her, the certificate, and an equal share with the plaintiff in the benefits to be derived therefrom; but there were no facts, other than those stated above, to support this finding. After the death of the insured, and upon proof thereof made by the plaintiff, the insurance company drew a warrant, payable to her guardian, for the sum of three thousand dollars, but refused to deliver it unless the certificate of membership was surrendered. This certificate the plaintiff was unable to produce, because it was in the possession of Thomas's widow, who declined to give it up unless she was permitted to share equally with the plaintiff in the proceeds of the certificate.

Under the by-laws of the company, it could not be compelled to pay the amount of the certificate unless it was produced for surrender and cancellation. The plaintiff, by her guardian, brought this action against the company and Mary E. Thomas for the purpose of compelling her to deliver to plaintiff the certificate, and obtaining from the company the amount thereof. The insurance company took no part in the controversy, and alleged that it was merely a trustee of the money, and was willing to pay it, upon the surrender of the certificate, to the person or persons who might be adjudged by the court entitled thereto.

The special term found, as conclusions of law, that the plaintiff and her step-mother were joint and equal beneficiaries in the certificate, and in the moneys and benefits secured thereby, and that each was entitled to have and receive one half thereof. The general term ordered the judgment entered thereon to be reversed and a new trial to be had. From that order the defendant, Mary E. Thomas, has brought this ap-

peal, stipulating for judgment absolute against her if the order is affirmed.

In the application which Thomas made for membership, he directed that, in case of his decease, all benefits to which he might be entitled from the company be paid to the plaintiff. In the certificate of membership, subsequently issued, it is declared to be subject to the conditions set forth in the application for membership, and to the laws of the order governing the relief fund, out of which it was to be paid, and the certificate was to be in force, and the rights and privileges of membership of the order continue, so long as the member should comply with the constitution, laws, and regulations adopted for its government. Under the by-laws of the order, each member was required to enter upon his application the name of the person to whom he desired the benefit to be paid in case of death, "subject, however, to such future disposal of the benefit as the member may thereafter direct," and which shall be entered in the relief-fund certificate according to such direction; and a member in good standing might at any time surrender his relief-fund certificate, and a new certificate would be issued, payable to such person as the member might direct, upon payment of a fee of fifty cents.

The case does not disclose any other provision, either of the constitution or by-laws of the order, which it is material to consider. Upon these facts, it must be held that there was no valid change of the beneficiary named in the original application and certificate of membership, and that the plaintiff is entitled to the entire benefit fund. The application, certificate, and by-laws of the order constitute the entire contract between the parties, and while the insured reserved the power to change the beneficiary, that power must be executed in the way prescribed in the contract. The beneficiary could not be changed secretly and without the consent of the order. The agreement of the defendant corporation was to pay the whole sum to the plaintiff, unless the insured directed it to pay to some other person, and surrendered his certificate, and received a new certificate, in which the name of the new beneficiary must be entered according to his direction.

The corporation had no knowledge of the attempt on the part of the insured to designate his wife as one of the recipients of the benefit fund, never assented thereto, and there never was any compliance with its by-laws in this respect. It was, therefore, under no legal liability to pay Mrs. Thomas any

part of the moneys due upon the certificate, and without such liability she cannot succeed in her contention.

Undoubtedly the insured in this case acted in good faith and from the best of motives. His changed domestic relations made it eminently proper for him to make some provision for his wife, and the equal division which he contemplated of the fund between her and his daughter was just and commendable. Very likely he believed that he had so far modified his first appointment of a beneficiary as to include his wife therein, and that if he had supposed that any action upon the part of the corporation was necessary, it would have been sought and obtained. But it is not a case where equity can interfere to remedy a defective execution of a power: *Bacon on Benefit Societies*, secs. 240, 284; *Scott v. Provident Mut. R. Ass'n*, 68 N. H. 556; *Knights of Honor v. Nairn*, 60 Mich. 44. The insurance company did not, in the lifetime of the insured, assent to the change of the beneficiary. Had it done so, and the original certificate been surrendered, the omission of any subsequent step might have been supplied. In *Luhre v. Luhre*, 128 N. Y. 367, 20 Am. St. Rep. 754, the insured had surrendered his certificate to the local lodge, with directions to have a new certificate issued, payable to another beneficiary, but the certificate had to be transmitted to the supreme lodge and a new certificate issued by it, and before this could be done the insured died. It was held that as every provision of the constitution and by-laws had been complied with by the insured, and the certificate surrendered to the local lodge in his lifetime, and nothing remained to be done by the grand lodge except the formal issue of a new certificate, which it had no discretion to refuse, the old certificate was to be regarded as canceled, and the subsequent issue of the new certificate as directed related back to the time of the surrender of the original certificate to the local lodge. The case is cited by the appellant's counsel, but we cannot see how it aids her. That case turned upon the fact that there had been a literal compliance by the insured with all the requirements of the constitution and by-laws of the order, which regulated the exercise of his power to appoint a new beneficiary, which is entirely wanting here.

The order appealed from should be affirmed, and judgment ordered for the plaintiff for the relief demanded in the complaint, with costs.

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**MUTUAL BENEFIT SOCIETY — CHANGE OF BENEFICIARY.** — Where a certificate of membership and insurance issued by a benefit society specifies the

mode in which a change of beneficiary may be made, such mode must be strictly followed to be valid, and where the certificate specifies that such change is to be made by an entry thereof on the records of the society, a mere delivery of the certificate, with oral declarations in relation thereto, will not accomplish a change of beneficiary: *Rollins v. McHatton*, 16 Col. 203; 25 Am. St. Rep. 260, and note; *McCarthy v. Supreme Lodge*, 153 Mass. 314; 25 Am. St. Rep. 637, and note.

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## MATTER OF SMITH.

[181 NEW YORK, 239.]

**THAT THE GIFT OF THE INCOME OF PROPERTY** is a gift of the property itself is true only when there is no limit of time attached to the gift.

**A GIFT OF INCOME, FOLLOWED BY THE GIFT OVER OF THE CORPUS ON THE HAPPENING OF A CONTINGENCY**, or on the death of a beneficiary, by necessary construction, without express words, is a gift of the income for the intermediate period only.

**TRUST—CONTINUANCE OF.**—Where, by a will, property is directed to be held in trust and invested, and the trustees are to pay a specified sum monthly to the testator's son for his support and maintenance, and that of the latter's daughter during her minority, provided she resides with certain relatives after she attains the age of eight years and until she is twenty-five years old, and if she survives her father she is to receive one half of the trust funds, and the remainder shall be divided among testator's heirs at law, but in no event shall testator's son be vested with or control any part of the principal, the trust thus created continues after the death of the daughter and during the life of her father.

**WILLS.—GIFT OF PROPERTY TO A CLASS OF PERSONS**, distributable at a time subsequent to the death of the testator, ordinarily includes all persons in being at the time appointed for the distribution who belong to the class, whether born before or after the death of the testator; but this rule does not prevail when a different intention appears from the will.

**WILL—GIFT TO A CLASS, WHEN DOES NOT INCLUDE PERSONS SUBSEQUENTLY BORN.**—If a testator bequeaths to each of his grandchildren the sum of ten thousand dollars, directing, during the minority of each, and until each shall attain twenty-five years of age, that his or her share shall be kept invested and the proceeds paid to his or her mother semi-annually, and in the event of the decease of any mother, the income to be added to the principal fund, and in the event of the death of either of said grandchildren before twenty-five years of age that his or her share shall be divided among the surviving grandchildren, share and share alike, the grandchildren born after the death of the testator are not entitled to any part of the bequest.

**PROCEEDING** to settle accounts and construe a will made by Lewis R. Herrick, who died in 1877. The testator left surviving him a widow, two daughters, one son, and six grandchildren. His son, Richard P. Herrick, had a daughter, Emma Dude Herrick, who died in 1884. After the death of the tes-

tator, his son contracted a second marriage, the fruits of which were two children. As against these grandchildren, it was claimed that they were not entitled to anything under the fourth clause of the will, and the surrogate so decided. He also decided that the trust in favor of the testator's son continued, notwithstanding the death of Emma Dude Herrick. The son and his two infant children appealed. The fourth and fifth clauses of the will were as follows:—

“4. I give and bequeath to each of my grandchildren the sum of ten thousand dollars, to be paid to them on their severally attaining the age of twenty-five (25) years. I direct that during the minority of any such grandchildren, and until they shall respectively attain the age of twenty-five years, the said sum shall be invested by my executors in bonds and mortgages or other safe securities, and the interest and proceeds arising therefrom shall be paid semi-annually to the respective mothers of said children, and in the event of the decease of any mother, the said interest shall be added to the principal fund, which, with all accumulations, shall be paid to each of said grandchildren as above mentioned. In the event of the decease of either of said grandchildren prior to attaining the age of twenty-five years, then I direct that the share of such deceased shall be equally divided between the surviving grandchildren, share and share alike. All the grandchildren, as a class, shall take, irrespective of relationship, as a brother or sister of a deceased child. With respect to my granddaughter, Emma Dude, daughter of my son, Richard P. Herrick, I direct that the interest arising from the investment of her ten thousand dollars, instead of being paid to her mother, shall be added to the one-third part of my estate hereinafter devised and bequeathed to her said father.

“5. After satisfying the foregoing provisions, I direct that all the rest, residue, and remainder of my estate, both real and personal, be divided into three (3) equal portions, and I give, devise, and bequeath one such third part to Helen E. Smith, wife of J. Moreau Smith, one other third part to Emma C. Morse, wife of Rollin E. Morse, and the remaining one-third part I direct shall be held in trust by my executors upon trust to invest the same upon such securities as hereinbefore mentioned, and out of the proceeds arising therefrom to pay to my said son, Richard P. Herrick, the sum of one hundred dollars per month for his support and maintenance, and for the support, maintenance, and education of his daughter, Emma

Dude Herrick, during her minority, provided and upon the sole condition that after she attains the age of eight (8) years, she shall return to the residence at that time of my wife or her relatives residing within the state of New York, it being anticipated that her father may return and reside with her; but this clause shall be operative only in the event that my said grandchild shall be able to and shall actually reside with her said relatives, either alone or with her father, as the case may be, and shall be governed by their tuition, advice, and directions, or by the advice and counsel of my executors, or a majority of them, until she attain the age of twenty-five (25) years. In case my said granddaughter shall neglect or refuse to reside with her said relatives during said period intermediate eight and twenty-five years of age, then all the provisions in this will contained relating to my said grandchild shall, during such period of refusal, be deemed wholly inoperative and void, and shall be construed as if no clause or recognition were had of my said grandchild. In the event of my said granddaughter surviving her father, Richard P. Herrick, then she shall receive one half of his one-third part of the residue of my estate hereinbefore given and devised to him on her arriving at twenty-one years of age, and the remaining moiety of his said one-third part shall be equally divided between my heirs at law,—that is, to my said daughters, or their several children as a class, in the event of the decease of either my daughters then surviving, share and share alike.

“In no event shall my said son, Richard P., be vested with, receive, or control any part of the principal of the said one third, but the same shall be held as a trust estate only, and the income only paid to him. If from sickness or any other unavoidable necessity, the above-mentioned provision shall not be sufficient for the support and maintenance of my said son, Richard P., and his daughter, Emma Dude, then I direct my executors, or a majority of them, to apply such part of the accumulated interest or of the principal fund, constituting such one-third part of the residue of my estate, as shall, in the judgment of my executors, or a majority of them, be necessary to supply the deficiency. In the event of the decease of my said son, Richard P., leaving no issue surviving him, then I direct that the said one-third part hereinbefore given and devised in trust for him shall revert to my heirs at law then surviving, and be equally divided between them, share and share alike. This provision shall not be construed as vesting

any estate in my said son, Richard P. Herrick, and the words 'heirs at law' shall include my grandchildren then surviving as a class."

*W. A. Sutherland and Arthur E. Sutherland, for the appellants.*

*David Hayes and William W. Webb, for the respondents.*

**ANDREWS, J.** We find no basis for the claim that the trust created by the fifth clause of the will terminated at the death of Emma Dude Herrick, the daughter of the testator's son Richard. It is true that the duration of the trust is not expressly declared. But it was created primarily for the benefit of the testator's son, Richard, and the inference that it was to continue during his life is plain. The benefit of the daughter was incidental and subordinate to the main purpose of the testator. The income from the trust estate was to be paid to Richard in monthly payments, and it was left to him to apply it to the support of himself and his daughter during her minority, and the condition annexed to her right to support and maintenance was apparently inserted as a means of securing a compliance by the granddaughter with the testator's wish that she should reside with the relative designated. The death of the father is the event upon which the trust by necessary implication is limited, and the gift over is upon that event alone. The gift over, on the contingency of the death of Richard, leaving no issue surviving, is preceded by the clause, "in no event shall my son, Richard P., be vested with, receive, or control any part of the principal of the said one third, but the same shall be held as a trust estate only, and the income only paid to him." These provisions seem to be conclusive that the trust was to continue during Richard's life. The rule that the gift of the income of property is a gift of the property itself only applies when there is no limitation of time attached to the gift. A gift of income followed by a gift over of the *corpus* on the happening of a contingency, or on the death of the beneficiary, by necessary construction and without express words, is a gift of the income for the intermediate period only.

The other question of construction relates to the claim of the two children of Richard P. Herrick by his second wife to share in the legacy of ten thousand dollars given to their half sister, Emma Dude Herrick, by the fourth clause of the will.



The claim of the appellants on this branch of the case is based on the general rule which has been declared in many cases, that where a legacy is given to a class of persons, distributable at a time subsequent to the death of the testator, all persons in being at the time appointed for the distribution, who answer the description, whether born before or after the death of the testator, are deemed to be objects of the gift, and are entitled to share: *Teed v. Morton*, 60 N. Y. 506, and cases cited. This construction is placed on the presumed intention of the testator. In the case which most frequently occurs, of a legacy to A for life, and after his death to the children of A, this presumption is founded upon strong probability, since in such a case the immediate object of the testator's beneficence is A, and it is natural to suppose that the children of A were made ultimate beneficiaries by reason of their relationship to A, and all bearing that relation when the fund is distributable would be within the motive. The rule applies whether the legacy (if future) is vested or contingent. In the one case, those of the class existing at the death of the testator take a vested interest, subject to open and let in persons of the class subsequently born and living at the time appointed for the division; in the other, the happening of the event determines both the vesting and the persons entitled to take: See *Tucker v. Bishop*, 16 N. Y. 402. But it is obvious that a testator may devote his gift to a whole class or restrict it to certain individuals of a class; to persons of a class living at his death, or to such persons and all others who may belong to the class at the period of distribution. It is a question of intention, and where the question arises judicially, it is to be determined by the intention declared by the will and the *res gestæ*.

We think any intention to include grandchildren not born at the testator's death in the benefit of the legacies which fail by the death of any grandchild before the age of twenty-five is negatived on the face of the will. The testator made no direct provision for unborn grandchildren. He gave to each of his living grandchildren a legacy of ten thousand dollars. He says to "each of my grandchildren," and admittedly only living grandchildren take a primary legacy. The construction of these words is the same as if the testator had named each of the six grandchildren in place of using the words "each of my grandchildren." The contention is, that the meaning of the word "grandchildren" used in the direct bequest is enlarged when the testator in the same clause provides for the

evolution of the share of any grandchild dying before attaining the age of twenty-five years. The language of the provision is: "In the event of the decease of either of said grandchildren prior to attaining the age of twenty-five years, I direct the share of such deceased shall be equally divided between the surviving grandchildren, share and share alike." The natural meaning and reading refers the words "surviving grandchildren," in this sentence, to the survivors of the grandchildren previously designated. It would wrench the manifest sense of the clause to give it any other interpretation. There is no doubt that the word "survivors" refers to a survivorship at the death of the grandchild, and not at the death of the testator. But what survivors, is the question to be determined. The answer plainly is, survivors of the six legatees, all of whom were of the same degree of relationship with the testator and constituted a class, although not all the individuals who at some time were grandchildren of the testator. Reference to a paragraph in the fifth clause of the will shows with great distinctness that the testator, in framing his will, either did not have grandchildren who might be born after his death in mind, or that he did not intend to provide for them. In the gift over the trust fund in the event of the death of Richard before the death of his daughter Emma, he gives one moiety to Emma and the other moiety to the testator's daughters, making no provision whatever for any children Richard might have, who should be born after the testator's death. Richard was then a young man, and his remarriage was probable, and did in fact occur. This omission is quite significant that the testator did not intend, in the gift over of Emma's legacy on her death before twenty-five, that brothers or sisters who might be born after his death should share in the distribution. We think the judgments below on this point follow the natural and reasonable interpretation of the will, and that the two children of Richard born after the testator's death are not entitled to any share of the legacy given to their half-sister Emma.

There are some other questions which arose on the accounting. They are fully considered in the opinion of the surrogate, and were, we think, correctly decided.

We discover no error in the judgment, and it should therefore be affirmed.

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**GIFT OF INCOME WHETHER GIFT OF PROPERTY.** — Whether a gift of personal property for a lifetime with a gift over is absolute depends upon the na-

ture of the property. Where money is given, the gift is of the interest only: *Whittemore v. Russell*, 80 Ma. 297; 6 Am. St. Rep. 200, and note. Under a bequest of the use of a residue for life or a shorter period, the legatee has no right to the possession of the fund in the mean time, and if the executor pays it over without taking ample security for the return of the principal, he will be liable to those entitled: *Clark v. Clark*, 8 Paige, 152; 35 Am. Dec. 676, and note; *Field v. Hitchcock*, 17 Pick. 182; 28 Am. Dec. 288. But where a bequest of the produce of a fund is made without any limit as to its continuance, the legatee is entitled to the principal also: *Craft v. Snook*, 13 N. J. Eq. 121; 78 Am. Dec. 94, and note. A devise of the rents and profits of land operates as a devise of the land: *Zimmer v. Seannott*, 134 Ill. 505.

**LEGACY — BEQUESTS TO A CLASS — EFFECT OF DEATH OF TESTATOR.** — A bequest to "all the children" of a person named equally, when they shall severally attain a certain age, inures to all children born before the first child attains that age, though after the testator's death, but not afterward: *Hubbard v. Lloyd*, 6 Oush. 522; 53 Am. Dec. 55, and note. Persons born after the death of a testator cannot take under a legacy to a class, unless there is a fixed period for the distribution: *Myers v. Myers*, 2 McCord Ch. 214; 16 Am. Dec. 648. Only grandchildren in being at the death of the testator take under a devise to grandchildren and their heirs forever: *Loockerman v. McBlair*, 6 Gill, 177; 46 Am. Dec. 664, and note.

## CITY OF BUFFALO v. PRATT.

[181 NEW YORK, 203.]

**MUNICIPAL CORPORATION — STREETS.** — A MERE ABUTTER, with no ownership in the bed of the street, is entitled to protection against interference with certain easements in the street. They constitute property of which he cannot be deprived without compensation.

**MUNICIPAL CORPORATION — STREETS.** — ABUTTING LAND-OWNER WHO OWNS THE FEE OF A STREET in front of his premises, subject to an easement therein as a public highway, has a right to defend against and enjoin the use of the street for purposes inconsistent with those uses to which streets should be, or ordinarily have been, subjected, unless just compensation is made; and if the municipality is authorized to institute proceedings to acquire the fee on such streets, it must pay substantial damages, to be ascertained by measuring the effect upon the value of the property resulting from depriving the owner of the fee of the streets.

*William F. Mackey*, for the appellant.

*John G. Milburn and Frank O. Ferguson*, for the respondents.

**GRAY, J.** In this proceeding the city of Buffalo sought to acquire the fee in a public place or street, under authority conferred in a section of the city charter, which reads as follows, viz.: —

"The city may take in fee, for public streets, alleys, and squares, the lands situate within the boundaries of any of the public streets, alleys, or squares in said city, which have been, or shall have been, used as public streets, alleys, or squares for more than ten years."

The public street affected by this proceeding was known as "The Terrace," and had been, concededly, in use as a street for a great number of years, and prior to the purchase by the respondents of their properties. Concededly, also, the respondents own the fee of the portion of the street in front of their premises.

The object of the city in seeking to acquire the fee in this street is not disclosed, and it is not very material. A first report by the commissioners awarded nominal damages to the owners of the fee of the land in the street; but upon its coming before the court for confirmation, and being then objected to, it was ordered to be set aside, on the ground that the commissioners had adopted an improper rule of appraisement in awarding only nominal damages, and the report was sent back to them for further consideration. By their new report substantial damages were awarded, and being confirmed by the court below, the sole question presented upon the appeal here is, whether the respondents are entitled to other than nominal damages. The point made by counsel for the city is, that the respondents, having acquired the fee of the street in front of their property subject to a perpetual public easement therein, acquired only the naked legal title to the fee; and therefore should be entitled to nominal damages only. This position the counsel for the city seeks to fortify by a reference to many authorities in this state and elsewhere, the most weighty of which seem to be cases arising in street-opening proceedings in New York City: *In re Mayor etc.*, 1 Wend. 262; *In re Mayor etc.*, 2 Wend. 472; *Livingston v. Mayor etc.*, 8 Wend. 85; 22 Am. Dec. 622; *Champlin v. Laytin*, 18 Wend. 411; 31 Am. Dec. 382; *In re Thirty-second Street*, 19 Wend. 128; *In re Twenty-ninth Street*, 1 Hill, 189.

It may be well to consider the nature of these New York City cases. They were decisions by the old supreme court and the court of errors, and were made in proceedings taken on behalf of the city of New York for the opening up of streets, and upon applications to set aside or to confirm the commissioners' reports as to damages. The question was, whether the city should pay the full value of the lands taken for the street,

and it was held that only nominal damages should be awarded. The decisions proceeded, however, upon the theory that the right to claim damages upon the opening of the streets by the city was in the original grantor or former proprietor of the lands, who had made sales of parcels or lots bounded upon streets as projected upon the city surveys and upon maps. It was held that their grantees had acquired no title to the land occupied by the street, but had only acquired, by a conveyance on or bounded by streets, an easement or right of way in the street. As to the former proprietor of the land, he was considered to be entitled only to nominal damages, because he must be deemed to have engaged to give the ground for the street whenever the city required it, or to have adopted the street as it had been previously laid out by public authority. It should be observed, in considering these cases, that Manhattan Island had been surveyed under acts passed very early by the legislature of the state of New York. This legislation provided for and regulated the future opening by the city of streets and avenues, as surveyed and laid out in anticipation of the growth of that municipality, and it was also provided, that, as the result of street-opening proceedings, the fee should at once vest in the city. The compensation for the land the court decided to be due to the former proprietor, who had granted the lots upon the streets, and not to the purchasers from him; but this compensation should only be nominal and as for the naked fee, because an easement or right of way was vested in the purchasers under a dedication of the land in the street, and because there was an implied agreement on the part of the former owner to give the land for the street, when the city, by instituting proceedings to open it, thereby adopted it as proposed. He was deemed to have granted with reference to existing legislation, and in anticipation of the future opening of the streets by the city. He was deemed to have received an enhanced value from his grantee by reason thereof, and from his having dedicated the land to street purposes. The purchasers were held to have taken no interest in the street, other than that of an easement or right of way. Apparently, the principle which the decisions undertook to work out was that of protecting the abutting owners against being charged for the value of the fee taken by the city, and the court was concerned with the relative situations of the original grantors and these abutters. In *Bissell v. New York Central R. R. Co.*, 23 N. Y. 61, the question upon the case was, whether

certain conveyances between the years 1828 and 1845, conveying lots in the city of Rochester, on either side of Erie Street, carried lands to the center of that street. It was held that where a conveyance was bounded upon or by a street, it carried the fee to the center of the street as part of the grant, notwithstanding the authority of the New York City street cases, which were there and are here referred to. It is a question how far the Bissell case impairs the force of the authority of the decisions in the New York City street cases, for they went upon the theory that the grantees acquired no title to the land in the street at all. But however that may be, and independently of such considerations, I think that the New York City cases were influenced by an existing state of facts which is not paralleled here. The proceedings here have no reference to any original dedication which contemplated the future adoption of the street by the city authorities, and the vesting of the fee in the city, as a consequence of the institution by them of legal proceedings. Nor do they rest upon any legislation existing at the time of the grants by the former proprietors, or in view of and subject to which sales might be deemed to have been made. The record is barren of evidence as to the authority by which the street in the present case came as such into the public use; or as to whether and how it was ever dedicated by the owner of the land. What we do know is, that these respondents acquired the fee of the land in the street opposite their premises, and that the right of the city to take it was conferred by subsequent and recent legislation with respect to the municipal charter.

I do not think that it is needed, or that it would be profitable, to review the many cases in which the rights of owners of property in and abutting upon the street have been considered. The result has been to generally define and assign their particular interests and rights. The mere abutter, with no ownership in the bed of the street, is entitled to protection against an interference with certain easements in the street. They constitute property, of which neither legislature nor municipality can deprive him without compensation: *Kane v. New York Elevated R. R. Co.*, 125 N. Y. 164.

It is unquestionable, however, that the ownership of the fee of the land in a street has a substantial value to the abutting property holder, in the degree of control it gives to him over the uses to which the street may be put. It vests him with the right to defend against and to enjoin a use of or an en-

encroachment upon the street, under legislative or municipal authority, for purposes inconsistent with those uses to which streets should be or have been ordinarily subjected, unless just compensation is provided to be made. His ownership of the land in the street was subject only to the public easement therein as a highway. In the absence of such a provision for compensation, the taking of the street for some new or additional and inconsistent use would be illegal. But if the abutting property owner does not own the fee in the land of his street, he has no such right to compensation, and is remediless against a taking of the street under legislative or municipal sanction for other uses, except such other uses be unreasonable, and in their nature so improper as to obstruct a free passage upon the street, or to amount to a nuisance, or to deprive him of the enjoyment of easements of light, air, and access. As to any such improper or unreasonable use of a street, the abutting property owner would undoubtedly have the right to come into a court of equity and to claim its intervention to protect his general rights. In this case no reason appears, or suggests itself, to show that the public good and advantage will be better promoted by a change of title from the present owner to the municipal government. For all governmental purposes, the existing easement and public right of passage in the street are sufficient, and will be in the future, unless there shall be some purpose to impose an additional burden upon the street; in which case, the substantial nature of the respondents' interest in opposing the award of merely nominal damages becomes very clear indeed. The fee of the land has a value to him; it seems valuable to the municipality. He has possible interests at stake to protect; the municipality may have other interests to advance. It is authorized by law to take from him his title, and he cannot defeat the proceedings; but the law requires just compensation to be made to him. What is there in the law, or in reason, which disentitles him to the receipt of substantial damages? I see nothing, and I am averse to holding that the exclusive rights in the land occupied by the street which he possesses, subject only to the public easement, can be taken from him by governmental authority without just compensation, to be measured by the value of these rights to him. I think that, within the circumstances of the case, the respondents were entitled to be awarded, as the compensation provided to be made in the act upon the taking by the city of the fee of the land in the street in front of their



premises, such substantial damages as would be ascertained by measuring the effect upon the value of their property of such a deprivation.

The order appealed from should be affirmed, with costs.

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**MUNICIPAL CORPORATIONS — RIGHTS OF ABUTTING OWNERS IN STREETS.**  
— An abutting owner, the fee of the street being in the city, is entitled to the use of the street, and neither the legislature nor the city can devote it to purposes inconsistent with street uses, without awarding compensation to such owner: *Abendroth v. Manhattan R'y Co.*, 122 N. Y. 1; 19 Am. St. Rep. 461, and note; *Lectutter v. City of Aurora*, 126 Ind. 436.

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## **CROSS v. UNITED STATES TRUST COMPANY.**

[181 NEW YORK, 280.]

**PERPETUITIES.** — A provision in the will of a married woman, by which the absolute ownership of property is suspended during the life of her four children, and for a still longer time if any of them die leaving grandchildren not yet twenty-five years of age at the death of the last surviving child of the testatrix, is void, as creating a perpetuity forbidden by the laws of the state of New York.

**WILL CREATING LEGAL AND ILLEGAL TRUSTS** may be permitted to stand, and to be enforced so far as the legal trusts are concerned, if they can be separated from the illegal trusts and upheld without doing injustice or defeating what the testator must be presumed to wish.

**CONFLICT OF LAWS. — PERSONAL PROPERTY IS SUBJECT TO THE LAW OF THE OWNER'S DOMICILE** with respect to its disposition *inter vivos* and its transmission by last will and testament.

**CONFLICT OF LAWS — PERPETUITIES.** — A trust created by a will made in another state wherein the testator was domiciled, and which would be void if made in this state, as creating a perpetuity forbidden by its laws, will be here enforced with respect to the personal property situated and the legatees residing in this state, if it is valid and enforceable by the laws of the state in which the testator was domiciled when the will was executed and also at the time of his death.

**CONFLICT OF LAWS — WILLS. — VALIDITY OF BEQUESTS IN FOREIGN WILLS** should be decided by the same law which governs the will in other respects, and hence the validity of such bequests is to be determined by the law of the testator's domicile.

*Edward C. James*, for the appellants.

*Edward W. Sheldon, Nicholas Quackenbos, and Martin F. McMahon*, for the respondents.

**O'BRIEN, J.** The will of Phebe Jane Cross, bearing date May 29, 1877, disposed of a large estate for the benefit of her husband and four children. After making sundry absolute

and specific bequests, she gave to the United States Trust Company, a New York corporation, seven hundred thousand dollars, in railroad bonds specifically described, to have and to hold in trust for the purpose of collecting and receiving the income thereon, until the payment of the principal, and upon such payment to invest and keep invested the proceeds in safe interest-paying securities, and to collect and receive the income on the same, and to apply it to the execution of five separate trusts for the benefit primarily of her husband and each of her four children. As none of the estate is involved in this action except the portion embraced in these trusts, and that only in a general sense, it is only necessary to give a brief outline of the scheme of the testatrix with respect to this part of her property, without any very minute examination of the legal questions which might possibly arise upon the construction of this part of the instrument in some other form of action. The bonds above mentioned were divided into five parts, and the testator directed the trust company, as trustee, to pay the income of one part to her husband during his life, and upon his death, to her grandchildren in equal shares, until the death of her surviving child, and as there were four of the children, the trust was therefore to continue during the life of the husband and all of the four children respectively. Upon the death of the last surviving child, the principal was to be disposed of by the trustee by dividing it into as many parts as there should be grandchildren of the testatrix living, and deliver one part to each who had then reached the age of twenty-five years, but if any of them were under that age, then the trustee was directed to set aside and hold the parts of such grandchildren, and pay the income to them until they should reach that age, when they were to receive the principal absolutely. The trusts for the benefit of the children were identical as to each, but differed slightly from that for the husband. The trustee was directed to pay the income of the part set aside for each child to him or her for life. If either of the children died without children, then the income which such deceased child was to receive under the trust, if living, was to be paid to the survivors in equal shares, and to the children of any deceased child, the latter to take as a class the share that the deceased parent would have taken if living. If either of the children of the testatrix should die leaving children, then the trustee was directed to divide the principal, or part from which the deceased parent received the income, into as many

parts as there were children of such deceased parent surviving, and deliver one of such parts to each of said children who had then attained the age of twenty-five years, to hold absolutely. But if any of said children were under that age, then the trustee was to hold the share of such child, and pay the income thereof to him until he arrived at that age, when he was to receive the principal absolutely; and if any child of such deceased parent should die before reaching the age of twenty-five, then his part was to be paid to his surviving brothers and sisters; and if all the children of such deceased parent should die before arriving at that age, then the trustee was to pay the share of the deceased parent, to which they would have been entitled if living at said age, in equal shares to the children of the testatrix then living; and if none of the children of the testatrix were then living, the trustee was directed to pay said sums over to her surviving grandchildren, in equal shares, to hold absolutely. Upon the death of the last surviving child, the trustee was directed to divide all the bonds and securities remaining in its possession, in the manner above described, in which the principal of the fund for the benefit of the husband was to be disposed of. The husband and two of the sons were appointed executors of the will, and the residuary estate was bequeathed to them in trust to convert into money and to pay certain legacies, and the remainder to the heirs at law of the testatrix "who, by the laws of the state of New York relating to the distribution of intestate estates, would have been entitled to receive the same" in case of intestacy. The husband died on the ninth day of June, 1889, and that part of the trust intended for his benefit has terminated. Mrs. Cross left two sons and two daughters. One of the sons is married, but has no children; the other never married. One of the daughters is a widow, and has three children, one of whom is married. The other is married, but without children. The two sons, as surviving executors and trustees under the will, and individually with the daughter who is without children, brought this action against the trust company, as trustee, and the widowed daughter and her three children, for the purpose of procuring a judgment declaring the trusts void after the death of each of the primary beneficiaries, on the ground that they are in contravention of the statute against perpetuities.

With respect to the provision for the benefit of the husband, the absolute ownership of the property bequeathed was suspended by the terms of the will for more than two lives in

being at the death of the testatrix. The fund could not be released from the trust till the death of the husband and the last survivor of the four children, and the case is therefore within the statutory prohibition against the suspension of the absolute ownership and power of disposition of personal property: *Ward v. Ward*, 105 N. Y. 68; *Smith v. Edwards*, 88 N. Y. 92; *Colton v. Fox*, 67 N. Y. 348; *Schettler v. Smith*, 41 N. Y. 328; *Knox v. Jones*, 47 N. Y. 889; *Coster v. Lorrillard*, 14 Wend. 265; *Lorrillard v. Coster*, 5 Paige, 172.

The absolute ownership and power of disposition was further suspended upon the lives of those grandchildren of the testatrix who were under twenty-five years of age at the death of her last surviving child, and until such grandchildren, respectively, arrived at that age, as to the share of each of them in the personal estate, and this might possibly involve a suspension of the whole or some part of the property embraced in the trust upon a life or lives not in being at the death of the testatrix: *Van Cott v. Prentice*, 104 N. Y. 56; *Hawley v. James*, 16 Wend. 61; *Smith v. Edwards*, 88 N. Y. 92.

The trusts created for the benefit of the children seem to be open to the same objection. In so far as the duration of the trust is concerned, it might be held good, in the contingency of the death of the first beneficiary leaving children, because in that case the suspension is only upon the life of such beneficiary, whose children take absolutely. The difficulty of this feature of the case is, that as to the children of a deceased parent who are under twenty-five at his death, the absolute ownership is liable to be further suspended upon the life of a child born after the death of the testatrix: *Tiers v. Tiers*, 98 N. Y. 568.

But the disposition of the bonds, in the event of the death of any of the children without issue, would seem to be clearly against the terms of our statute, as in that event the absolute ownership would be suspended during the life of such child, then during the successive lives of the other three, or the last survivor of them. Then there was liable to be a further suspension during the minority, under twenty-five, of any grandchild living at the death of the last surviving child of the testatrix, as to the share of such grandchild, or for his or her life within twenty-five years. This brief reference to the legal questions involved in the will, growing out of the bequests in trust, under our statute, has been thought necessary only for

the reason that one of the defendants in this action, a grandchild of the testatrix, is an infant. Except for that fact, it might be sufficient to say, that, upon the argument, there was no attempt made upon the part of any of the learned counsel for the defendants to uphold these provisions of the will as valid under our statute. On the contrary, they must be understood, by the course of the argument, as admitting that the trusts are not valid under our law, but notwithstanding this, they strenuously urge that all the provisions of the will are legal, for reasons which must now be noticed. It has been found as a fact, conclusive upon us, that from a time anterior to the execution of the will up to the time of her death, on the 29th of June, 1878, the testatrix and her husband were inhabitants of and domiciled in the state of Rhode Island; and further, that by the laws of that state, then and now in force, all the provisions, trusts, and remainders contained in the will are valid and effectual. The will was admitted to probate, and the executors accounted in that state. They transferred the bonds embraced in the trust to the trustee, and these provisions of the will have been executed and carried out since the death of the testatrix. The bonds disposed of by the provisions in question were always actually within this state, and there seems to be no substantial controversy between the counsel with reference to the legal propositions asserted in behalf of the plaintiffs, namely, that all the primary trusts are valid, and can be upheld under our law upon the principle that where several trusts are created by a will which are independent of each other and each complete in itself, some of which are legal and others illegal, and the legal can be separated from the illegal, and upheld without doing injustice or defeating what the testator might be presumed to wish, the illegal trusts may be cut off and the legal permitted to stand: *Kennedy v. Hoy*, 105 N. Y. 134; *Manice v. Manice*, 43 N. Y. 384; *Schettler v. Smith*, 41 N. Y. 328; *Savage v. Burnham*, 17 N. Y. 561, 576, 577; *Post v. Hover*, 33 N. Y. 593, 598; *Harrison v. Harrison*, 36 N. Y. 543; *Van Schuyver v. Mulford*, 59 N. Y. 432; *Tiers v. Tiers*, 98 N. Y. 568.

It is not necessary to a decision of this case to point out the precise application of this rule to the trusts in question, and therefore we will not stop to consider how far, if at all, the elimination of the subsidiary trusts would interfere with the scheme of the testatrix as a whole, or the precise portion of

the disposition that would be permitted to stand under our law.

On this principle, the only part of the property in question yet released from the trust is the share set aside for the benefit of the husband, the trust in his favor having terminated by his death. The controversy is thus reduced, so far as this court is concerned, to a single question, and that is, whether this action can be maintained to declare invalid a disposition of personal property by will, perfectly lawful and valid at the place of the owner's domicile when made, but which would be invalid if this were a New York will. The property and the trustee are here. So are all the beneficiaries, except one of the grandchildren, who resides in the state of Connecticut. From the present situation of all parties interested in the property thus disposed of, it may be assumed that the trust is to be administered here.

It is a general and universal rule that personal property has no locality. It is subject to the law of the owner's domicile, as well in respect to a disposition of it by act *inter vivos* as to its transmission by last will and testament, and by succession upon the owner dying intestate. This is, in substance, the language in which Judge Denio stated the law in this court, and which he concisely and clearly extracted from the authorities cited by him: *Parsons v. Lyman*, 20 N. Y. 112.

The learned judge added, that "the principle, no doubt, has its foundation in international comity, but it is equally obligatory, as a rule of decision on the courts, as any legal rule of purely domestic origin. It does not belong to the judges to recognize or to deny the rights which individuals may claim under it at their pleasure or caprice; but it having obtained the force of law by user and acquiescence, it belongs only to the political government of the state to change it whenever a change becomes desirable." We have in this case the grandchildren of the testatrix, who, next after her husband and children, were the objects of her bounty, claiming certain interests in the *corpus* of the trust estate which vested in them under the terms of the will and the law of the domicile. They say that we have no right to use the law of New York for the purpose of cutting them off from their inheritance, lawfully bequeathed to them by the law of the state where their ancestor was domiciled when she made formal disposition of her property. It is manifest that this presents a question touching the disposition and transmission of personal property by will,

which must frequently arise, of the very highest importance. The plaintiffs admit that, so far as concerns the formal requisites essential to the validity of the will as a testamentary instrument, the capacity of the testatrix, and the construction of its provisions, the law of the domicile must govern; but the validity of the particular trusts attempted to be created depends upon the law of the domicile of the legatee, and the government under which the fund is to be held and administered. In other words, it is claimed that this case forms an exception to the general rule that a disposition of personal property is governed by the law of the domicile of the owner, and that the trust must stand or fall, not upon that law, but upon the law of the domicile of the legatee. The reason for this exception is said to be, that we will not permit a trust to be maintained and administered within the state which is contrary to its public policy, though valid where created. The mind does not readily accept the assertion that it is, in fact, contrary to the public policy of this state to permit the property embraced in these trusts to be held and used here according to the terms of the will of the owner and the law of the domicile. Should our legislature deem it for the public good to repeal the statute relating to wills, and to provide that all property should, upon the death of the owner, pass under the laws of intestacy, a disposition by will of personal property actually within the territory of the state, but owned by a person domiciled in another state, would still be valid, providing it was valid by the law which governed the owner. When it is urged that we are bound by foreign law as to all the formal requisites of a will as a testamentary instrument, the capacity of the testator to make it, and its legal construction, meaning, and effect, and not bound by such law with respect to the particular bequests by which the testatrix has distributed her property among her heirs and next of kin, it is not perceived that such a distinction has any sound reason or principle to rest upon. A cause of action or right to property created by the statute laws of another state and arising there is recognized here, and may be enforced, though our own statute on the same subject may be different in details. The two statutes need not be identical in terms or precisely alike. It is enough if they are of similar import and character, founded upon the same principle, and possessing the same general attributes: *Wooden v. Western N. Y. & P. R. R. Co.*, 126 N. Y. 15; 22 Am. St. Rep. 803.



It does not follow that a trust created by the laws of another state is contrary to our public policy with respect to accumulations and the suspension of the absolute ownership, simply because the law of that state differs in some respects from ours. It may be assumed that all our sister states have enacted laws on this subject, having the same general purpose in view as our own. Some of them permit a longer and others provide for a shorter period of suspension, but the policy of all is the same. The state of Rhode Island has a statute on this subject framed to secure the same end as our own. It provides that no person shall have a right to devise any estate in fee-tail for a longer time than to the children of the first devisee, the first devisee to take an estate for life only, the remainder on his decease to vest in his children or issue generally, according to the directions of the will: Laws R. I., c. 182, sec. 2; *Sutton v. Miles*, 10 R. I. 348. While this statute in terms applies to realty, the principle embodied in it has been extended to bequests of personal property by the decisions of the courts of equity of that state. The testatrix in the case at bar could, if domiciled here, have created the trust in question, and suspended the absolute ownership of the principal of the fund till the death of the survivor of the two youngest grandchildren living at her death, and yet this disposition might result in keeping the property under the trust for as long a period of years as does the present will. The only material difference in the law of the two states on this subject is, that in each a different rule is adopted for measuring the period within which absolute ownership may lawfully be suspended. Granting that in most cases this period might be longer in Rhode Island than in New York, have we any right for that reason to declare the dispositions of this will void? If so, then a person desiring to make a will must not only know the law of his domicile, but also the law of every other country in which his personal estate may happen to be at his death, and our courts will become the resort of dissatisfied heirs or legatees, seeking to nullify wills valid by the laws of the place where the persons who made them were domiciled. The question is not changed by the circumstance that the trustee and the trust fund is within our jurisdiction, and all the beneficiaries but one are now residents of this state. The will was valid or not at the moment of the death of the testatrix, and if it was valid then it is valid now. Nothing that has since transpired can change any right which it confers. Had a

Trustee been selected at the place of the domicile, instead of here, he would have been entitled to receive the bonds from their custodian in New York, and our courts would have enforced that right, as they have in at least three of the cases which will be noticed hereafter. And had the trustee afterwards moved into this state and brought the property with him, he could have held it by virtue of his original title under the will. It would be pushing the doctrine of state policy too far to hold now, after the trusts have been treated as valid by all concerned for twelve years, that they are void. When an instrument affecting the title to personal property valid in its origin is sought to be set aside upon the ground that it is in some way contrary to the policy of our laws, a clear case must be established.

In a recent case in this court, its aid was sought to set aside bequests in a will made by a person here to charitable and benevolent corporations in another state, within two months prior to his death. Under our statute of 1848, providing for the incorporation of similar institutions, such bequests were prohibited as to such corporations, and the argument in support of the action was, that to permit bequests made here to the foreign societies, within two months, to stand would be against our public policy on this subject; but as it appeared that no such restrictions existed in the state where the legatees were located, the bequests were held to be valid: *Hollis v. Drew Theological Seminary*, 95 N. Y. 166. Judge Earl, in speaking for the court, employed language, in discussing the question, which seems to be very much in point: "The courts will not enforce contracts or the payment of legacies which are against public policy. But it is not always easy to determine when contracts and legacies are against public policy. Some cases are plain, and have been settled by the repeated decisions of the courts. Contracts tending to undermine public morals, to endanger the public health or the public safety, to prevent competition at judicial sales, to improperly influence legislation or the action of public officers or the administration of justice, and to unreasonably restrain trade or marriage,—all these have been condemned as against public policy. In condemning such contracts, judges have acted upon what they deemed sound public policy, and have undoubtedly, in some measure and in a remote sense, assumed legislative functions. It is difficult to define and limit the power thus to enforce public policy which is not found in the statute law, and it

should be exercised only in clear cases, and generally within limits already defined by decisions of acknowledged authority, based upon rules of common law. There is certainly no occasion for stretching the power so as to apply it to new or doubtful cases in a state where the legislature is in session one third of the year, and thus competent to indicate the public will as to any line of supposed public policy. . . . Contracts which are held to contravene public policy are always essentially vicious, or always have evil tendencies. They are not sometimes valid and sometimes invalid, but are always invalid, and the courts will never tolerate or enforce them."

The learned judge, to fortify his position, quoted approvingly the language of Judge Story in the case of *Vidal v. Girard*, 2 How. 127: "Nor are we at liberty to look at general considerations of the supposed public interests and policy of Pennsylvania upon this subject, beyond what its constitution and laws and judicial decisions make known to us. The question, what is the public policy of a state, and what is contrary to it, if inquired into beyond these limits, will be found to be one of great vagueness and uncertainty, and to involve discussions which scarcely come within the range of judicial duty and functions, and upon which men may, and will, complexionally differ."

It is certain that there is no statute in this state that in terms condemns trusts in foreign wills that would be illegal if made here, and unless our judicial decisions furnish a rule on this subject, we are left to these uncertain and conflicting notions in regard to public policy which Judge Story said "scarcely come within the range of judicial duty and functions." It would be difficult to furnish a stronger illustration of the correctness of this remark than is to be found in the very able discussion of the question upon the briefs of counsel in this case. With commendable industry and learning they have explored the whole field of discussion, but the leading cases, supposed to have a bearing on the question, are cited on both sides. The question as to what is public policy, and what is contrary to it, is involved in so much uncertainty and confusion, as it must be from its very nature, that each side has been able to find, in the cases of his opponent, some expression of opinion favorable to his own views; and yet it can be said that all the cases cited from this court, when properly understood and limited, as authority to the questions actually passed upon, were correctly decided.

The leading case relied upon by the plaintiff is *Chamberlain v. Chamberlain*, 43 N. Y. 424. The question involved in that case was the corporate capacity of a legatee in another state to take a charitable bequest under a will here; and as it appeared that by the law of the state creating the corporation, and in which it was located, that it had power to take bequests by will, it was held that such bequest to it was valid. Judge Allen, in delivering the opinion of the court, said: "The law of the testator's domicile controls as to the formal requisites essential to the validity of the will, as a means of transmitting property, the capacity of the testator, and the construction of the instrument. Personal property has no locality, and therefore the law of the domicile of the owner governs its transmission, either by last will and testament, or by succession in case of intestacy. But if, within the *lex domicilii*, a will has all the forms and requisites to pass the title to personalty, the validity of the particular bequests will depend upon the law of the domicile of the legatee, and of the government to which the fund is, by the terms of the will, to be transmitted for administration, and the particular purposes indicated by the testator. Whatever may be the law of Pennsylvania, a testator domiciled in that state cannot establish by bequests of personalty to citizens or corporations of this state a charity in trust to be administered here, inconsistent with the policy of the laws of this state. . . . So far as the validity of bequests depends upon the general law and policy of the state, affecting property and its acquisition generally, and relating to its accumulation and a suspension of ownership and the power of alienation, each state is sovereign as to all property within its territory, whether real or personal."

This language is broad enough to cover the plaintiff's contention. But the point we are now considering was not in any sense before the court, and the language of the opinion should be limited to the point under discussion and which was decided. When the learned judge said that the validity of a particular bequest would depend upon the law of the domicile of the legatee, he had reference to the capacity of the legatee to take, and that, of course, depended upon the statutes of Pennsylvania. This is entirely evident from what he says in a subsequent part of the opinion (p. 435): "No allusion has been made to the laws of that state regulating or restraining the accumulation of personal property, or the suspension of the ownership and power of alienation of either real or personal

there. The validity of the provision in favor of this society depends upon its power to take and hold in the manner and for the purposes indicated by the testator." The power to take was no doubt governed by the law of the domicile of the legatee, as neither the will nor the law of the testator's domicile could confer this power upon a corporation of another state.

The case of *Manice v. Manice*, 43 N. Y. 387, also cited by both sides, decides nothing, so far as this question is concerned, except that a bequest by a citizen of this state in a will here to Yale College was valid, it having been shown that the college had capacity to take by the laws of its own state. By what law the validity of a trust is to be determined was not involved in this case. Indeed, it was quite uncertain whether, as to that bequest, there was any trust at all. It was probably an absolute gift: Page 388.

*Despard v. Churchill*, 53 N. Y. 192, was the case of a disposition by will in California by a citizen of that state, void under the laws of this state in its material provisions, of personal property actually within this state. It was held that the validity of the disposition was to be determined by the law of the testator's domicile, and the court remitted the property to California, to be there administered in conformity with the provisions of the will of the owner.

The learned judge who delivered the opinion of the court, after making reference to our statute against accumulations, said that "as this sovereignty will not uphold a devise or bequest by one of its citizens in contravention of that policy, it will not give its direct aid to sustain, enforce, or administer here such a devise or bequest made by a citizen of another sovereignty." The authority cited for this proposition was *Chamberlain v. Chamberlain*, 43 N. Y. 424. The learned judge added: "Yet it is no part of the policy of this state to interdict perpetuities or accumulations in another state." It is quite significant, however, after what was said about directly aiding in carrying out such a bequest, that this court remitted the property to another state, there to be devoted to a trust which would have been unlawful here. This course was adopted, not on the ground of policy, but because it was always the law in such cases to remit personal estate to the domicile of the owner, in the exercise of a sound judicial discretion: *Parsons v. Lyman*, 20 N. Y. 112; *Harvey v. Richards*, 1 Mason, 381-407.

The plaintiff's argument in this case would seem, logically,

to require the court to hold in such a case that as to the property in this state the owner died intestate; but Judge Folger was careful to state the principle upon which the case really turned, for after referring again to his statement in regard to giving any direct aid in carrying out here such a bequest, he added: "And yet they may not hold the bequest void when it is valid by the law of the state by which the disposition of the property is to be governed."

It is plain that the question now before us was not involved in these cases and was not decided. The cases of *Draper v. Harvard College*, 57 How. Pr. 269, *Kennedy v. Town of Palmer*, 1 Thomp. & C. 581, and *Mapes v. American Home Missionary Society*, 33 Hun, 360, in so far as they decide any principle applicable to this question, rest upon the authority of *Chamberlain v. Chamberlain*, 43 N. Y. 424.

It can therefore be safely asserted that there is no controlling authority in this state in support of the proposition that the validity of bequests in foreign wills may be tested by some other law than that which governs the will in other respects, or that requires us to disregard the disposition made of the fund in this case under the law of another state. The authorities cited in support of the defendant, or most of them at least, are open to the same criticism as those of the plaintiff. They are not wanting in strong and clear expressions in favor of the rule that the validity of particular bequests in a will is to be determined by the law of the testator's domicile, but in many of them the point was not necessarily involved, and the rule was stated or assumed as the settled law, by way of illustration, or for the purpose of re-enforcing some other principle upon which the case turned: *White v. Howard*, 46 N. Y. 144; *Matter of Hughes*, 95 N. Y. 55; *Hobson v. Hale*, 95 N. Y. 588; *Bascom v. Albertson*, 34 N. Y. 584; 3 Am. & Eng. Ency. of Law, 633; Dicey on Domicile, 294.

The rule, however, is well settled in Massachusetts. A citizen of that state made a bequest to a town in New York for the benefit of the poor, which bequest would not be valid if made here, but it was held by the supreme court of that state, upon full consideration, that the bequest was valid, and that its validity was to be determined by the law of the testator's domicile, and not by the law of New York, where the trust was to be executed. The doctrine of that case has ever since been followed in that state: *Fellows v. Miner*, 119 Mass. 541; *Sohier v. Burr*, 127 Mass. 221; *Sewall v. Wilmer*, 132 Mass. 131. The

same rule is laid down by the United States supreme court: *Jones v. Habersham*, 107 U. S. 174.

The courts of this state have been exceedingly liberal in recognizing and enforcing rights acquired under the laws of other states, and even of foreign countries: *Teel v. Yost*, 128 N. Y. 394. If there is any one of our statutes that may be said to represent a distinct policy of the state, it is that regulating the rate of interest on money. Usury is a vice that avoids contracts into which it enters, and subjects the party receiving it to indictment; and yet it is the settled law that a note made by citizens of this state here, payable to a citizen of another state, at a rate of interest that would be unlawful here, but is lawful there, will be enforced by our courts in favor of the holder in another state, and that, too, though the note was payable here, it having been given in renewal of a note upon which the same parties were liable, made and payable in the other state. In such cases we give effect to the foreign law, though contrary to our own, because it is the law that governs the contract: *Staples v. Nott*, 128 N. Y. 403; 26 Am. St. Rep. 480. A rule which prescribes that the formal requisites and construction of a will, and the testator's capacity, are to be determined by the laws of one state, and the validity of his dispositions of personal property by the laws of some other state or country, would be exceedingly inconvenient and uncertain, and no sound principle or decisive authority requires us to sanction it. All these questions should be determined by the same law. Effect should be given to this like every other will, if that can be done without disregarding legal rules, and we think it can. Every right that any party acquired under it by the law of the domicile ought in justice and by comity to be respected here. That law declares these trusts valid, and it is binding upon us by that comity which which is part of our municipal law. The other view would not only defeat the intention of the testatrix, but would be contrary to justice and sound policy. Our statute relating to the suspension of the absolute ownership of personal property applies to dispositions made within our own jurisdiction, and when it is deemed wise to extend it to such a case as this, the law-making power, and not the courts, should do it.

It may be doubted whether the corporate powers conferred upon the trustee in this case are broad enough to authorize it to execute a trust created as this was: Laws 1853, c. 204; Laws 1863, c. 60. But though that question has come in in-



cidentally on the argument, it is not properly before us. This is not an action to remove the trustee. There is no allegation in the complaint that it is incompetent to act, and no relief is asked on that ground. There is no finding or request to find on that subject. The want of corporate capacity in the trustee to act would not be fatal to the trust. The proper court would not allow the trust to fail because the trustee is disabled, but would appoint a new one: *Perry on Trusts*, 4th ed., sec. 38.

While not assenting to all the reasons for the decision contained in the numerous opinions below, our conclusion is, that the judgment is right, and should be affirmed, with costs.

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**WILLS — RULE AGAINST PERPETUITIES:** See *Lawrence's Estate*, 136 Pa. St. 354; 20 Am. St. Rep. 925, and note, with cases collected; *Barnum v. Barnum*, 26 Md. 119; 90 Am. Dec. 88, and extended note.

**WILLS — TRUSTS IN — SOME LEGAL, OTHERS ILLEGAL.** — Where there is a devise of property in trust, and some of the trusts are valid and others are not, the property vests in the trustees, the legal estate to be applied to the valid trusts only: *Greene v. Greene*, 125 N. Y. 506; 21 Am. St. Rep. 743, and note; but see *Tilden v. Green*, 130 N. Y. 29; *ante*, p. 487.

**PERSONAL PROPERTY — DISTRIBUTION — LAW OF PLACE.** — The personal property of a decedent passes and is to be distributed according to the law of the country where he was domiciled at the time of the death: *Townes v. Durbin*, 3 Met. 352; 77 Am. Dec. 176, and note; *Wheeler v. Hollis*, 19 Tex. 522; 70 Am. Dec. 363, and note; extended note to *Montgomery v. Miliken*, 43 Am. Dec. 518; note to *Bryan v. Moore*, 13 Am. Dec. 349; *Nelson v. Potter*, 50 N. J. L. 324.

**WILLS — LAW OF TESTATOR'S DOMICILE AS GOVERNING BEQUESTS.** — The law of the testator's domicile at the time of his decease, in case of a bequest, governs the validity of such bequest: *Ford v. Ford*, 70 Wis. 19; 5 Am. St. Rep. 117, and note 148.

**WILLS, VALIDITY OF — BY WHAT LAW GOVERNED.** — The validity of a will must be determined by the laws of the state in which it was made: *Burlington University v. Barrett*, 22 Iowa, 60; 92 Am. Dec. 376, and note. For the law governing the interpretation and validity of foreign wills, see *Gilman v. Gilman*, 52 Me. 165; 83 Am. Dec. 502, and note; *Corrigan v. Jones*, 14 Cal. 311.

**PEOPLE v. FORMOSA.**

(121 NEW YORK, 42.)

**CORPORATIONS — EVIDENCE.** — THE EXISTENCE OF A CORPORATION is established *prima facie* by evidence tending to show that it transacted business as such, and by the fact that all the witnesses speak of it as a corporation.

**CONSTITUTIONAL LAW.** — CORPORATIONS organized or doing business under the laws of this state for life insurance are absolutely under the direction and control of the legislature, and the legislature has the same power and authority to regulate the conduct of their agents as it has to regulate the corporations themselves.

**CONSTITUTIONAL LAW.** — STATUTE MAKING IT CRIMINAL FOR THE AGENT of a life insurance company to pay a rebate to induce a person to effect an insurance in a company is constitutional, and may be enforced against the agent of a foreign insurance company doing business in this state.

*W. Henry Davis*, for the appellant.

*George A. Benton*, for the respondent.

**EARL, C. J.** In 1889, the defendant was the agent at Rochester of the National Life Insurance Company of Montpelier, Vermont, a corporation organized under the laws of that state and doing business in this state. He was indicted, tried, and convicted under the act, chapter 282 of the Laws of 1889, for paying and allowing to one Graves, as an inducement to him to insure his life in that company for three thousand dollars, a rebate of fifteen per cent on the first year's premium. The defendant assails the judgment of conviction upon various grounds.

He was indicted on the thirtieth day of October, 1890, and the indictment alleges the commission of the offense on the twenty-sixth day of October, 1890. The proof showed the commission of the offense to have been about one year earlier, and his counsel now claims that there was a fatal variance between the time alleged in the indictment and that shown by the proof. It does not appear by the record that this variance was in any way called to the attention of the court upon the trial, and the record contains no exception presenting the point for our consideration. If objection on this ground had been made at the trial, the court could have allowed an amendment of the indictment under section 293 of the Code of Criminal Procedure: *People v. Johnson*, 104 N. Y. 213; *People v. Jackson*, 111 N. Y. 362.

The indictment alleges that the Vermont company was a corporation organized under the laws of that state, and it is

claimed that no proof was given upon the trial showing its corporate existence. No such objection was made at the trial, and there is no exception presenting that point for our consideration. If objection had been made, the district attorney might have furnished the technical proof required to establish the incorporation of the company. But we agree with the court below that there was sufficient evidence that the Vermont insurance company was a corporation authorized to carry on the business of insurance. If it was not, it could not, under the laws of this state, have transacted business here. It appeared in the evidence that it was transacting business here; that the defendant represented it, and held it out as a corporation. It was spoken of by the witnesses as such, and the policy which was issued to Graves was indorsed by the defendant as "General Agent of the National Life Insurance Company of Vermont." In the absence of objection, such evidence was sufficient; and so we think the objection was not well taken.

The main point, however, upon which the learned counsel for the defendant relies here is, that the act making it a criminal offense for him to pay a rebate to induce any person to effect insurance in the company was unconstitutional, on the ground that it arbitrarily and unjustly abridged his natural rights and personal liberty in the conduct of his business. He claims that the act has no relation to the public safety or welfare, and hence that it could not be enacted under the police power which the state, through its legislature, can exercise. Life insurance companies perform very important functions in modern society. They operate in all parts of the state, and a very large number of people are interested in them. They are resorted to for the purpose of making provisions for families and dependents after the death of the insured, and for that purpose many persons invest in them the accumulations of their labor and their thrift. The nature of insurance contracts is such that each person effecting insurance cannot thoroughly protect himself. He is not competent to investigate the condition and solvency of the company in which he insures, and his contracts may run through many years, and mature only, as a rule, at his death. Under such circumstances, it is competent for the legislature, in the interest of the people and to promote the general welfare, to regulate insurance companies and the management of their affairs, and to provide by law for that protection to policy-holders

which they could not secure for themselves. Under such conditions, there should be a wide range of legislative power to promote the public welfare in the exercise of the police power, and the true boundaries of that power it would be difficult, in such a case, to prescribe. We have no occasion now to specify to what extent it may reach, or in any way to place upon it its proper limitations, because, in order to justify the act in question, it is not necessary to resort to that power.

The business of life insurance in this state is mainly carried on by insurance companies authorized by law, and minute provisions are made regulating their incorporation and their business; and a department of the state government has been constituted to supervise them. The corporations organized under the laws of this state for life insurance are absolutely under the direction and control of the legislature. It may specify how and on what terms they may do business, and enact laws regulating their conduct and the conduct of their agents, for their protection and the protection of their policyholders, and enforce obedience to such laws by such penalties, forfeitures, and punishments as it may, within constitutional limits, prescribe. As all these corporations must act through agents, it has the same power and authority to regulate the conduct of their agents as it has to regulate the corporations themselves. It would be quite preposterous to say that the legislature could, in the exercise of its legitimate authority, regulate these corporations and prescribe the terms under which they may exist and do business, and yet could not, by similar laws, regulate and control the conduct of their agents. When these corporations seek the benefits and privileges of the laws creating and authorizing them, they must conform to the laws enacted for their conduct, and if they are unwilling to do so, they must go out of existence. So, too, all persons who seek to act as agents of such corporations must conform to the laws regulating the business of such corporations or cease to act for them.

We have not here the question as to what a private individual may do in the conduct of his private business, but the question here is as to the power of the legislature over corporations and their agents. The power exercised over these insurance companies and their agents is similar to that exercised by the legislature over banks and railway corporations; and it has never been doubted that such power exists, and the legislative power to regulate them and their agents in the

minutest particular in the interest of the public has never been questioned.

The fact that this company was a foreign corporation can make no difference. When it comes into this state by comity to do its business here through its agents, it must obey our laws and conform to our public policy, and if they are unwilling to do so, they must keep out of the state.

We may not be able to perceive the purpose or the wisdom of this act. It is sufficient that we perceive the legislative will in the act, and we need not speculate as to the policy which prompted it.

So we think there is no doubt that the act is constitutional, and the judgment should be affirmed.

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**CORPORATIONS — EVIDENCE OF EXISTENCE.** — The corporate existence of a company is not admitted from the fact that one dealing with it has, in a contract with the company, designated it by a name appropriate to a corporate body, unless it is distinctly stated in the contract that it is an incorporated company: *Holloway v. Memphis etc. R. R. Co.*, 23 Tex. 465; 76 Am. Dec. 68, and note; *Clark v. Jones*, 87 Ala. 474. When, in an action by a corporation, the plea of *non est* corporation is properly interposed, the plaintiff must prove its corporate existence, either by its articles of incorporation or charter, or by some admission on the part of the defendant, or by showing a state of facts which will operate as an estoppel: *Schloss v. Montgomery Trade Co.*, 87 Ala. 411; 13 Am. St. Rep. 51, and note.

**FOREIGN CORPORATIONS — CONTROL BY STATE IN WHICH DOING BUSINESS.** — There is an implied condition, both as to domestic and foreign corporations, that they will be subject to such reasonable regulations with regard to their business as the legislature may prescribe, and which do not interfere with the substantial privileges granted by the state: *Commonwealth v. New York etc. R. R. Co.*, 129 Pa. St. 463; 15 Am. St. Rep. 724, and note; *Erie R'y Co. v. State*, 31 N. J. L. 531; 86 Am. Dec. 226, and note; extended note to *Hollida v. Hunt*, 22 Am. Rep. 67.

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## UNITED STATES NATIONAL BANK v. EWING.

[121 NEW YORK, 503.]

**NEGOTIABLE INSTRUMENTS. — A NOTE ACQUIRED AS SECURITY FOR A PRE-EXISTING DEBT** is open to the defense that it was made for one purpose and had been used for another.

**NEGOTIABLE INSTRUMENTS. — INDORSEMENT MADE FOR THE ACCOMMODATION OF THE MAKER, UPON HIS EXPRESS ASSURANCE** that the instrument would be negotiated only in another state, cannot be enforced against the indorser, if, contrary to the agreement, it is negotiated in this state to one who has not parted with anything, nor made any new agreement in reliance upon it, and who received it merely as additional security for an antecedent debt.

**NEGOTIABLE INSTRUMENTS. — PAROL EVIDENCE IS ADMISSIBLE TO PROVE** that an indorsement was made upon the express agreement that the note indorsed should be negotiated at a specified place only.

*Ben. L. Fairchild*, for the appellant.

*John Notman*, for the respondent.

FINCH, J. The note sued upon was made by Madden and indorsed by Ewing for the accommodation of the maker, and by him was transferred to the plaintiff as added security upon a precedent debt. The holder parted with nothing upon receiving it, surrendered no right and no security, and made no new agreement in reliance upon it. In its hands, it was therefore open to the defense that, made for one purpose, it had been used for another, and that its diversion had served to discharge the indorser.

The trial court held that no such legal diversion had been established, and the contention here is, that the evidence on that subject should have been submitted to the jury as requested by the defendant.

The indorser testified that he gave his name upon the express assurance of the maker that the note would be negotiated in Louisville, Kentucky, in answer to the indorser's objection that he did not wish to put his name to paper which might be sued in New York. He added: "I finally made the indorsement on his assurance, and relying upon it, that the note would be negotiated in Louisville, and that he would meet it at maturity." There is no contradiction of this evidence, unless it be in the silence of the written contemporaneous memorandum which provided some security for the indorser. If that raised a question of fact as to the existence of the agreement, it should have been decided by the jury.

The answer made by the general term is, in substance, that the writing contained no restriction upon the use of the note, and the parol proof showed only a remark by the maker as to its intended use, which did not amount to a restriction; that if negotiated in Louisville the indorser could and would have been sued in New York; and the place of discount was immaterial. But we held in *Benjamin v. Rogers*, 126 N. Y. 70, that the surety has the right to impose any limit he may choose upon his liability, and that "he may always fix the precise terms upon which he is willing to become a surety, whether those terms seem to be material or immaterial." The restriction here does not seem to be material, and yet may have been

so in the mind of the indorser, and for reasons sufficient to him. He swears that he lent his name upon condition that the note should be negotiated in Louisville. If his testimony, read in connection with the writing, left possible the inference that no restriction was intended, the inference was one of fact, and not of law, and should have been left to the judgment of the jury.

The judgment should be reversed and a new trial granted, costs to abide the event.

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**NEGOTIABLE INSTRUMENTS — PAROL EVIDENCE OF AGREEMENTS CONCERNING.** — Proof of an oral agreement made at the time a note is signed by one as surety, that he shall not be liable thereon, is admissible to show want of consideration for the promise made in the note, and that it was signed as an accommodation to the payee therein: *Kalenkamp v. Gress*, 71 Mich. 675; 15 Am. St. Rep. 283, and note. Oral evidence is admissible to vary the *prima facie* effect of a blank indorsement by showing an agreement made at the time of the indorsement; and such agreement, when shown, will be treated as if written over the indorser's signature: *Perkins v. Catlin*, 11 Conn. 213; 29 Am. Dec. 282, and note. Parol evidence is admissible, in an action on a promissory note, to show that it was delivered on condition that the plaintiff should return it to the defendant on a certain day if demanded; that it was demanded, and its surrender was refused: *McFarland v. Sikes*, 54 Conn. 250; 1 Am. St. Rep. 111, and note.



CASES  
IN THE  
SUPREME COURT  
OF  
PENNSYLVANIA.

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**PICKETT v. PACIFIC MUTUAL LIFE INS. CO.**

[144 PENNSYLVANIA STATE, 79.]

**INSURANCE — ACCIDENT. — DEATH CAUSED BY ASPHYXIA OR SUFFOCATION,** due to the accidental and unconscious inhalation of carbonic-acid or other deadly gas in a well is a death by external, violent, and accidental means, within the meaning of an insurance policy providing that the insurance shall not extend to death caused "by inhaling gas."

**INSURANCE — ACCIDENT. — A CONDITION AGAINST "INHALATION OF GAS"** in an accident insurance policy is used to designate the common uses of gas in dentistry and surgery, and contemplates a voluntary and intelligent act on the part of the insured, and not an involuntary and unconscious act, as the inhalation of a deadly gas that has unexpectedly accumulated in a well.

**INSURANCE — ACCIDENT — EVIDENCE. —** Where neither the insurer's by-laws nor the application of the insured is attached to his policy of accident insurance, as required by statute, they are not admissible in evidence in aid of the policy.

*D. I. Ball and O. C. Thompson, for the appellant.*

*Charles H. Noyes, William E. Rice, W. D. Hinckley, R. Brown, and Charles W. Stone, for the appellee.*

**STERRETT, J.** The undisputed facts, upon which the jury in this case was instructed to find for the plaintiff the full amount of his claim, are briefly as follows:—

On June 4, 1889, the plaintiff's intestate, John W. Moore, received and paid for the policy of insurance on which this suit was brought, a copy of which will be found in the record. Returning to his boarding-house the same evening, he informed his landlady that he had had no dinner, and requested that his supper be prepared. He then went to the well in the open

yard for a drink, and finding that the pump required priming with water, he remarked that he would fix it, so as to obviate that difficulty in the future. After procuring a hatchet, and removing planks from the opening at the top, he descended into the dug-out portion of the well, which was four or five feet wide and only ten or twelve feet deep, for the purpose of closing a small opening in the iron pipe, about midway down. A few minutes later, his lifeless remains were found at the bottom of the well. He died from asphyxia or suffocation, due to the accidental and unconscious inhalation of carbonic-acid or other deadly gas that had unexpectedly accumulated in the dug-out portion of the shallow well.

The well, with which deceased was familiar, and in which he had been shortly before, was one of those known as a "driven well," made by driving an iron pipe into the ground to the depth, in this case, of about forty feet. For the distance of about ten or twelve feet from the top, the earth around the iron pipe was dug out so as to form, as above stated, an open well, of about four or five feet in diameter, in which there was little or no water. The top of the well was covered with plank. The deceased was a strong, healthy man. His sudden and wholly unexpected death, under the circumstances above stated, and within a few hours after he had procured the policy of insurance, undoubtedly resulted from external, violent, and accidental injuries or means, and without any conscious or voluntary act on his part. There was no evidence, nor was it even suggested, that he had committed suicide, or that he was wanting in reasonable care, or that he voluntarily exposed himself to danger. In describing the condition in which he found the body of deceased, the physician who made the *post-mortem* examination testified: "The general surface of the body was of a livid bluish color. The lips and tongue were blue. The right side of the head was partially distended with dark blood; the left side was nearly empty. The lungs contained more blood than they would under different circumstances; they were somewhat congested. The pulmonary arteries were distended with blood. The liver was slightly congested, and also the kidneys; there was, however, no disease of the kidneys, no disease of any of the internal organs. . . . His death was caused by asphyxia, due to the inhalation of gas."

If the latter undisputed and undoubtedly correct conclusion of fact needed any confirmation, it may be found in the testi-

mony as to the effect of the same noxious gas on those who went to the relief of the deceased, and assisted in removing his remains from the well. It shows how narrowly they escaped a similar violent and accidental death.

The notice and proofs of death were full and complete. Their sufficiency was not even questioned.

In view of the undisputed facts, of which the above is an outline, the learned president of the common pleas refused to affirm defendant's points for charge, some of which are predicated of the foregoing facts, and instructed the jury that upon the undisputed facts before them the plaintiff was entitled to recover, and there was accordingly a verdict and judgment in his favor. This action of the court in refusing defendant's points, and instructing the jury in plaintiff's favor, are the subjects of complaint in the several specifications of error.

The first and main point was as follows: "The clause in the policy of insurance sued on, to wit, 'This insurance shall not cover . . . death or injury resulting from or attributable partially or wholly to . . . inhalation of gas,' applies to the case of death resulting from asphyxia caused by inhaling gas accumulated at the bottom of the well."

This, in connection with the remaining seven points, was rightly refused. According to the undisputed facts above referred to, the death of the insured was caused by external, violent, and accidental means, and without any conscious or voluntary act on his part. No one knowing, as he did, the shallowness of the dug-out portion of the well would ever suspect the presence of noxious gas therein. Doubtless, he never for a moment contemplated the slightest danger. His death was purely accidental; quite as much so as if he had been suddenly and unexpectedly engulfed in water, and drowned. The deadly but invisible gas by which he was unconsciously and accidentally enveloped was undoubtedly the external and violent cause of his injury and death. According to the physician's testimony, above quoted, its violent effect upon the vital organs of the deceased was plainly visible at the time of the *post-mortem* examination.

As was well said in *Paul v. Travelers Ins. Co.*, 112 N. Y. 472, 8 Am. St. Rep. 758, which in principle rules this case: "As to the point raised by the appellant, that the death was not caused by external and violent means within the meaning of the policy, we think it a sufficient answer that the gas in the atmosphere, as an external cause, was a violent agency, in the

sense that it worked upon the intestate so as to cause his death. That a death is the result of accident, or is unnatural, imports an external and violent agency as the cause." In that case, the policy on which suit was brought provided that the insurance should not extend to death caused "by inhaling gas." It appeared that the insured was found dead in bed. Gas had escaped in the room, and death was caused by breathing the atmosphere of the room filled with gas. It was held that death was not caused by the inhaling of gas, within the meaning of the policy. The company relied upon the same narrow and technical defense that is made by the defendant in this case. In an able opinion reported in 45 Hun, 313, the learned judge of the general term, whose judgment was afterwards affirmed by the court of appeals, said, *inter alia*: "Was the death of the intestate caused by or through 'external, violent, and accidental means,' within the language of the policy? . . . . We should say the death was due to external and violent means as clearly as drowning. . . . . The cause of death came from outside, as surely as would a rifle-ball, or water in the case of drowning. The escape of gas into the room was violent, in the same sense that would be the flow of water into a wrecked vessel. In either case, the external means constitute the cause which produces death. It is a violent death, produced by an external power, not natural. Some poisons, such as opium and chloral, produce no violent action on the human system. The man who descends into a well of carbonic-acid gas is killed with no greater violence, perhaps, than was the intestate. Yet in all these cases, the result would be called a violent death. . . . . We also think the words 'inhaling of gas' were used to designate those common uses of gas in dentistry, surgery, etc. . . . . Evidently an exception from death caused by a surgical operation was not broad enough to include the use of anæsthetics preparatory to the operation. It contemplated a voluntary and intelligent act by the assured, not an involuntary and unconscious act."

On this question, the court of appeals, in affirming the decision of the general term, said: "A careful consideration of this instrument, and of the scope and design of its provisions, leads us to the conclusion that the appellant must fail in its contention. . . . . In expressing its intention not to be liable for death from 'inhaling of gas,' the company can only be understood to mean a voluntary and intelligent act by the insured, and not an involuntary and unconscious act. Read in that

sense, and in the light of the context, these words must be interpreted as having reference to medical or surgical treatment, in which, *ex vi termini*, would be included the dentist's work, or to a suicidal purpose. Of course the deceased must have, in a certain sense, inhaled gas; but in view of the finding that the death was caused by accidental means, the proper meaning of the words compels, as does the logic of the thing, the conclusion that there was not that voluntary or conscious act necessarily involved in the process of inhaling. An accident is the happening of an event without the aid and the design of the person, and which is unforeseen. . . . To inhale gas requires an act of volition on the person's part before the danger is incurred. Poison may be taken by mistake, or poisonous substances may be inadvertently touched; but whatever the motive of the insured, his act precedes either fact. . . . If the policy had said that it was not to extend to any death caused wholly or in part by gas, it would have expressed precisely what the appellant now says is meant by the present phrase, and there could have been no room for doubt or mistake. Policies of insurance are to be liberally construed, and, as in all contracts, conditions are to be construed strictly against those for whose benefit they are reserved."

The principles so well stated and enforced in the cases above cited were afterwards approvingly considered in *Bacon v. United States etc. Association*, 123 N. Y. 304; 20 Am. St. Rep. 748. In further support of the same principles, reference might be made to other authorities, among which are *May on Insurance*, 631, in which reference is made to *Trew v. Railway Pass. Assurance Co.*, 6 Hurl. & N. 839; *Winspear v. Accident Ins. Co.*, 6 Q. B. Div. 42; 29 Eng. R. 488; *Accident Ins. Co. v. Crandal*, 120 U. S. 532; *Mallory v. Travelers Ins. Co.*, 47 N. Y. 52; 7 Am. Rep. 410; *North American Ins. Co. v. Burroughs*, 69 Pa. St. 43; 8 Am. Rep. 212; *McGlinchey v. Fidelity and Casualty Co.*, 80 Me. 251; 6 Am. St. Rep. 190; *Eggenbergyer v. Guarantee Mut. Acc. Ass'n*, 41 Fed. Rep. 172; *United States Mut. Acc. Ass'n v. Newman*, 84 Va. 52; but further elaboration is unnecessary.

This case is not ruled by *Pollock v. United States Mut. Acc. Ass'n*, 102 Pa. St. 230, 48 Am. Rep. 204, on which defendant relies. While that case may well stand upon its own peculiar facts, we think the present case is clearly distinguishable in its controlling facts, as well as in the principles applicable to them. In that case, the injury did not result from external,

violent, and accidental means. The fatal drug was voluntarily and intentionally taken by the deceased. In deciding that case, this court never could have intended to lay down the broad rule, that in construing an accident policy there is no distinction between external, violent, and accidental causes of death, and those cases in which death results from voluntary acts. What was decided in that case was, that under the various clauses of the policy sued on there could be no recovery, and it was unimportant whether the means arose from the designing act of the insured or otherwise.

Another ground of defense suggested in defendant's fifth, sixth, and seventh points was, that the deceased was injured in an occupation or exposure classed by the company as more hazardous than that specified in the policy, etc. The points referred to appear to be predicated of testimony which was improperly before the jury. The company, in disregard of the provisions of the act of May 11, 1881 (Pub. Laws, 20), had failed to attach to the policy copies of the by-laws or application, and should not have been permitted, against plaintiff's objection, to give them in evidence. The act was passed in the interest of honesty and fair dealing, and its provisions should be strictly enforced. We have no doubt they apply to such companies as the defendant.

Without further referring to the specifications of error, it is sufficient to say that neither of them is sustained. The deceased was accidentally, violently, and fatally asphyxiated by the unknown presence of a fluid foreign to his person. If that fluid had been oil, smoke, water, or molten metal, the result would have been substantially the same. Death caused, not so much by the inhalation of the fluid, as by its action in excluding life-supporting air, would have inevitably resulted. A fair construction of the policy leads to the conclusion reached by the court below, that death resulting from causes such as killed the intestate is not within any of the exemptions relied on by the company.

Judgment affirmed.

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**ACCIDENT INSURANCE — INHALING GAS.** — Death by violent and external means, within the meaning of a policy of insurance, may be occasioned by breathing illuminating gas in the atmosphere: *Paul v. Travelers Ins. Co.*, 112 N. Y. 472; 8 Am. St. Rep. 758, and extended note; see *Insurance Co. v. Bennett*, 90 Tenn. 256; 25 Am. St. Rep. 685, and note.

**BECKER v. BERLIN BENEFICIAL SOCIETY.**

[144 PENNSYLVANIA STATE, 232.]

**BENEFIT ASSOCIATIONS — REDUCTION OF BENEFITS.** — Where a member of a benefit association is entitled to and has been paid weekly benefits at a rate fixed by its charter, it cannot, by subsequent amendment to its by-laws, reduce the amount of benefits to which he is entitled under such charter.

*B. W. Spangler and N. M. Wanner*, for the appellant.

*H. H. McClune and George B. Cole*, for the appellee.

**PER CURIAM.** We think the learned judge below took the correct view of this case.

Briefly stated, it is as follows: Some time after the defendant society became liable to the plaintiff for dues at the rate of two dollars and fifty cents per week, and after it had paid them for more than one year, it proceeded to amend its by-laws so as to reduce the amounts of benefits. This was certainly an easy mode of relieving the society from an obligation, and if successful, will doubtless be followed by other similar associations. The difficulty in the way of this convenient mode of paying debts is, that it is repudiation pure and simple. The argument that the plaintiff, being a member of the society, is bound by the by-law does not meet the difficulty. It may be a good by-law as to future cases, but at the time it was passed the plaintiff was something more than a member. He was a creditor whose rights had previously attached, and those rights cannot be swept away by such a scheme as this by-law.

Since the above was written, our attention has again been called to the case of *St. Patrick's Benefit Soc. v. McVey*, 92 Pa. St. 510. That case, however, does not conflict with this, for the reason that the resolution to suspend the weekly payment of benefits was passed before McVey became entitled to benefits as a sick member. He was a member of the society at the time, and bound by the resolution. There was no attempt to deprive him of benefits after the society became chargeable therefor.

Judgment affirmed.

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**BENEFIT ASSOCIATIONS — RIGHTS OF BENEFICIARIES.** — The by-laws, articles of association, and certificates of membership of mutual benefit associations determine the rights of the members and of the association, and may be enforced by the parties and beneficiaries according to their respective rights as therein provided: *Union Mutual Ass'n v. Montgomery*, 70 Mich. 587; 14 Am. St. Rep. 519, and note.



**MOVEY v. BRENDEN.**

[144 PENNSYLVANIA STATE, 235.]

**TRADE-MARKS — OWNERSHIP.** — An unincorporated association formed “for promoting the mental, moral, and physical welfare of its members,” but which is neither a manufacturer nor a dealer, cannot acquire a trade-mark in a label adopted by it.

**TRADE-MARKS — LABEL — INJUNCTION.** — An unincorporated association known as the “Cigar Makers’ International Union,” formed for promoting “the mental, moral, and physical welfare of its members,” but which is not a manufacturer nor dealer in cigars, cannot acquire a trade-mark in a label adopted by it, distinguishing and discriminating between the work of union and non-union workmen, and an injunction will not lie to restrain the use of a spurious imitation of such label by a member of a subordinate cigar-makers’ union.

*N. Franklin Hall and G. D. Eshleman, for the appellant.*

*Marriott Brosius, for the appellees.*

**WILLIAMS, J.** The question presented by this appeal is a new one; at least, it is new in this state. It involves important consequences to employers and employees, and it touches the rights and obligations of workmen in their relation to each other. The facts upon which the question is presented, as found by the learned master, are as follows: —

The Cigar Makers’ International Union of America is a voluntary, unincorporated association of workmen, organized, as its constitution affirms, “for promoting the mental, moral, and physical welfare of its members.” It has devised and registered the label which is the subject of this controversy, and claims an exclusive right to control its use. The office of the label is to advise the public that the cigars in the box which bears it were made by members of the union. Every member of the union in the United States and Canada is entitled to have this label upon the cigars made by him. The plaintiffs represent neither the Cigar Makers’ International Union, the alleged owner of the label, nor Strasser, the officer whose name appears upon it, but a subordinate local organization, known as No. 126, located at Ephrata, Lancaster County, Pennsylvania. No. 126 did not devise or register the label, and does not claim to own it, but asserts the ownership of the international organization, to which it is a tributary, and whose jurisdiction it acknowledges. The defendant is a manufacturer whose shop is, as the learned master finds, “a strict union shop,” belonging to Union No. 126. His workmen, ten or twelve in number, are members of the union. He, as the owner of a union shop, and

his men, by virtue of their membership, are entitled to the use of the label on the cigars made by them. He procured a quantity of imitation or counterfeit labels, because, as he alleges, he was refused the genuine when he applied for them, and avowed his purpose to use them. The plaintiffs then filed a bill, and asked the court to enjoin the defendant against the use of the imitation labels for any purpose whatever. Upon these facts, the master recommended, and the court made the decree asked for.

The grounds upon which an injunction will issue to restrain the infringement or appropriation of a trade-mark are well settled. They are: 1. The protection of property in a trade-mark; and 2. The prevention of fraud by an imitator. In either case, it issues at the suit and for the protection of the owner of the device or trade-mark infringed. The plaintiffs represent Union No. 126, which has no other ownership in or control over the international union's label than any others of the hundreds or thousands of subordinate unions scattered over the United States and the Canadas. If it can maintain this bill, then each and every subordinate union can do the same thing, although no one of these devised, registered, or claims to own the trade-mark, and may prevent its use by workmen and in shops which, under the general rules of the international body, are entitled to use it. But we are not disposed to impale this case upon what may be thought to be a technical point. On the other hand, we will consider whether the International Cigar Makers' Union is a trader, whether the label in question is a trade-mark, and whether, upon any ground of equitable relief, the plaintiffs are entitled to consideration in a court of equity.

The first question is disposed of by the learned master upon the pleadings. The organization that devised, registered, and owns the label is neither a manufacturer nor dealer, and has no trade in which a trade-mark can be used.

The second question would seem to go with the first. Trade-marks are provided for by the act of Congress of July 8, 1870. Registration is made under it by furnishing a statement, to be recorded in the patent-office, showing the names of the parties applying for the registration, with their residences and places of business, the class of merchandise, and a description of the goods composing the class, by which the trade-mark has been or is intended to be appropriated, together with a description of the trade-mark and fac-similes of it. This pro-

vision of the act clearly contemplates an actual business conducted by the person or persons named, the adoption of a trade-mark in that business, and its appropriation to a particular "class of merchandise" produced or sold by the parties making the registration. Any device, figure, or inscription which seems to indicate the personal origin of the goods may be adopted as a trade-mark: *Laughman's Appeal*, 128 Pa. St. 19. Such trade-mark will be protected against fraudulent imitation, whether registered or not: *Hoyt v. Hoyt*, 143 Pa. St. 628; 24 Am. St. Rep. 575. Registration affords evidence of ownership. Its object is to secure to the maker or dealer the fruits of his skill, industry, and reputation by a positive legislative provision: *Pratt's Appeal*, 117 Pa. St. 411; 2 Am. St. Rep. 676. But the act of Congress referred to makes it clear that it is a maker or a dealer only who is entitled to protection, for it declares that the commissioner of patents "shall not receive and record any proposed trade-mark which is not and cannot become a lawful trade-mark." Now, if the Cigar Maker's International Union was a business organization engaged in making cigars for sale, it could adopt and use a trade-mark in its business, and acquire property in it. But it is not a business organization. It neither makes nor sells cigars, but directs its attention to cigar-makers, and seeks "to promote the mental, moral, and physical welfare of its members." These are worthy objects. They deserve and should receive the encouragement and support of all right-minded men. It is obvious, however, that they are personal and social objects, not commercial ones. They do not look towards the production or sale of any class or quality of cigars or tobacco, but towards the personal elevation and comfort of cigar-makers. I conclude, therefore, that the Cigar Makers' International Union of America is neither a trader within the meaning of the common law, nor within the purview of the act of Congress. Not being a trader in any sense, it can have no distinctive trade-mark. Registration, under such circumstances, is not authorized by the act of Congress, and if made, confers no title, and gives no standing-ground in a court of law or equity.

I come now to inquire whether the adoption of the label for the purposes set forth in the bill gives to the international union any ground for equitable relief. We have seen that this label is not a trade-mark, and that the union is not in a business that enables it to adopt or require a trade-mark. Still it

is urged that as the defendant was about to use an imitation of the label, he should be enjoined, whether the label is a trade-mark or not. But what is this label, and why should it be protected? It purports to be "issued by the authority of the Cigar Makers' International Union of America" to the person who uses it. The name of the workman who made the cigars does not appear upon it, nor the owner or location of the shop at which they are made. It does not point out the personal or the local origin or ownership of the goods on which it is placed. On the other hand, it issues to every one of the many thousands of workmen who make up the membership of the union, and it certifies, in the name of the union, that the cigars in the box on which it is placed were made "by a first-class workman, a member of the Cigar Makers' International Union." Who this first-class workman was, where he lived, for whom he worked, the label does not tell. He is indorsed as a "first-class workman," because he is "a member" of the union. As to all who are not members, the label proceeds to define the position of the organization that issues it, by describing their work as "inferior rat-shop, cooly, prison, or filthy tenement-house workmanship." The label then proceeds in these words: "Therefore we recommend these cigars to all smokers throughout the world." The value of this label is in the recommendation and the reasons given for it. The label is thus seen to be something quite different from a trade-mark in its character, its purpose, and the manner of its use, viz., a device to distinguish between union and non-union workmen, and to discriminate against the work of the latter. It says to the public, in spirit and in effect: "Buy the cigars that bear this label, because they were made by a member of this union. Do not buy those not bearing it, because they were made by workmen who do not belong to us. Such cigars are the product of 'inferior rat-shop, cooly, prison, or filthy tenement-house workmanship.'" It is the request of a powerful labor organization to "all smokers through the world" to take sides with it in its contest with those who are outside of its membership, by refusing to buy the work of such persons. It is an attempt to use the public as a means of coercion upon them, compelling them to unite with the union in order to find a market for their goods or their labor.

Right here, let us distinguish broadly between an object and the means employed to reach it. Organization is the privilege, perhaps I might say the duty, of labor; and an organization

seeking to promote "the mental, moral, and physical welfare of its members," by securing fair wages, steady work, and the comforts of home for them, occupies a legitimate field of usefulness, and is capable of doing great good to its members and to the public. The Cigar Makers' Union is no doubt seeking to do such a work, and accomplishing much in that direction. What we are now considering is one of the means it employs to increase its membership, and to hurt workmen who do not belong to it. The real question now before us is, whether the international organization of workmen shall have the help of a court of equity in making war upon all cigar-makers who do not belong to it, and in driving their work out of the market by representing it as coming from inferior rat-shops, from coolies, prisons, or filthy tenement-houses. A "first-class workman" is one who does first-class work, whether his name is on the rolls of any given society or not. Filthiness and criminality of character depend on conduct, not on membership of the union. Legitimate competition rests on superiority of workmanship and business methods, not in the use of vulgar epithets and personal denunciation. When the Cigar Makers' International Union of America stigmatizes those who do not belong to it, and seeks to induce the public to discriminate against them and their work, by covering them with opprobrious epithets, it is not engaged in "promoting the mental, moral, and physical welfare of its members," but in trying to hurt and destroy those who do not choose to become members. While the courts would aid the former purpose in all ways within their power, they cannot help the latter.

We cannot justify the defendant's conduct. There is no rule of morals or of business upon which he can defend himself in the preparation and use of spurious labels. But it is not every wrong action that a chancellor will enjoin, because the purpose of an injunction is to protect the plaintiff in the exercise and enjoyment of a clear legal right, for an infringement of which the law does not afford an adequate remedy. If, therefore, the right of the plaintiff is doubtful, equity will withhold its aid. The plaintiffs in this case have no trade-mark to protect, and no right to a decree resting on the law relating to trade-marks. What they have is a label which recommends the purchase of cigars made by union men, and warns against the purchase of all others as inferior and unwholesome, because made in rat-shops, or prisons, or by coolies, or tenants of filthy tenement-houses. Their right to

use such a label may well be doubted, whether the question be treated as one of morals or of law. But the plaintiffs come into a court of equity, and seek to enlist the conscience of a chancellor in their behalf. They must come with clean hands, with a conscionable regard for the rights of others, ready to do equity on their part, and seeking only equity at the hands of the court. They do come in this case with the avowed purpose to do harm to non-union men, to prevent the sale of their work, to cover them with opprobrium; and they ask a court of equity to say that they have a right to do it. We decline to say so.

The decree of the court below is reversed, the injunction dissolved, and the bill dismissed.

As we cannot approve the conduct of the defendant, we shall not award him costs, but direct that each party pay the costs it has made, and that the fees of the master be paid in equal parts by the plaintiffs and the defendant.

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**TRADE-MARKS — DEVICE OF TRADE UNION WHEN NOT.** — A device adopted by a cigar-makers' union having thousands of members, to be placed on boxes of cigars made by its members, which does not indicate by what persons the cigars are made, where the right to use belongs equally to the members, and continues only so long as he is a member, is not a legal trade-mark, because it does not indicate by what persons the articles were made, and its use is not incident to any business, and there is no exclusive right to use it: *Cigar-makers etc. Union v. Conhain*, 40 Minn. 243; 12 Am. St. Rep. 726, and note.

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## GOOD v. FICHTHORN.

[144 PENNSYLVANIA STATE, 237.]

**WILLS — RESTRICTED DEVISE.** — Where a testator gives an absolute estate, and in subsequent passages of the will unequivocally shows that he means the devisee to take a lesser interest only, the prior gift is restricted accordingly; but mere precatory words will not affect the prior estate.

**WILLS — PRECATORY RESTRICTION ON DEVISE.** — Words in a will expressive of desire or recommendation will not convert an absolute devise into a trust, unless it clearly appears that the testator intended not to commit the entire estate to the devisee, or its ultimate disposal to his discretion, and while the words of request in the will are commands as to the direct disposition of the estate, yet they are not so as to limitations on previously granted estates, unless it affirmatively appears that they were intended to be imperative.

**WILLS — RESTRICTION ON DEVISE.** — Where a testator gives his wife an absolute fee by will, with express power to consume or convey, without devising the unconsumed residue himself, but desiring his wife to do so

in a certain manner, putting his request in strong words, ordinarily importing command, but so used as to indicate only an intent to control one of the incidents of the estate already devised, such request will not change, qualify, or reduce the estate previously given.

*B. F. Davis*, for the appellants.

*John H. Fry and William R. Wilson*, for the appellees.

**MITCHELL, J.** The will of Solomon Good gave his widow in the outset a fee-simple in the land in suit. This would be clear enough from the devise to her, "as her absolute property," in the fourth clause; but, as if to avoid any possible question on that point, the same clause vests her with "all powers and rights" that testator himself possessed while living, and subsequent clauses declare she shall have the power to sell, and that the proceeds shall be her absolute property. Then follows the clause upon which the present contention arises: "Should my wife, during her lifetime, not consume or use all my property, real and personal, for her proper support, then I do hereby enjoin and direct her to make and publish her last will and testament, that after her decease all the rest and residue not consumed, used, or sold by her shall be divided," etc. Did this clause reduce the fee previously given to a life estate as to the unconsumed residue?

That such effect may be produced is admitted, but the presumption is against it. The rule is well expressed by Strong, J., in *Sheets's Estate*, 52 Pa. St. 257, thus: "If a testator give an estate of inheritance, . . . and in subsequent passages unequivocally shows that he means the devisee to take a lesser interest only, the prior gift is restricted accordingly." As it must unequivocally appear that the testator meant to limit the estate, it has been uniformly held that no merely precautionary words will be sufficient. Thus in *Pennock's Estate*, 20 Pa. St. 268, 59 Am. Dec. 718, Lowrie, J., speaking of the English rule, which was held not to be adopted here, and to be fading away even in England, said: "If it can be implied from the words that a discretion is left to withdraw any part of the subject of the devise from the object of the wish or request, or to apply it to the use of the devisee, no trust is created"; and again: "If she could thus use (consume or spend) it, she was no trustee in the eye of the law." The general rule was accordingly held in that case to be that words expressive of desire or recommendation will not convert a devise into a trust, unless it appear that the testator intended not to



commit the estate to the devisee, or its ultimate disposal to his discretion. And in *Burt v. Herron*, 66 Pa. St. 400, it was held that while words of request in a will are commands as to the direct disposition of the estate, yet they are not so as to limitations on previously granted estates, unless it appear affirmatively that they were intended to be imperative. "All expressions," says Sharswood, J., "indicative of a wish or will are commands. It is different when, having made a disposition, he expresses a desire that the devisee should make a certain use of his bounty." See also *Hopkins v. Glunt*, 111 Pa. St. 287.

The true test of the effect of language apparently at variance with other parts of the devise is, whether the intent is to give a smaller estate than the meaning of the words of the gift standing alone would import, or to impose restraints upon the estate given. The former is always lawful and effective; the latter rarely, if ever: the first, because the testator's intention is the governing consideration in the construction and carrying out of a will; the second, because even a clear intention of the testator cannot be permitted to contravene the settled rules of law by depriving any estate of its essential legal attributes.

Applying this principle to the present case, it is clear, as already said, that the testator gave a fee-simple absolute to his widow, repeated and reiterated, as if he wished to put it beyond all question. But it is also clear that he still thought it necessary, or at least permissible, for him to prescribe how it should be used. Therefore he gives her all the rights and powers over it that he had while living, and in addition specifies the right to sell and convey, to make title, to use the proceeds, and lastly, as an adjunct to the will whose making he enjoins, "the power and authority" to appoint one or two executors, as she may deem proper. It is true that the words he uses in regard to the making of her will, "enjoin and direct," are in their natural meaning mandatory and imperative; but coming as they do at the end, and in connection with the express enumeration of useless and superfluous powers, they indicate an intent to grant or withhold incidents of the estate already given. As said by Mercur, C. J., in the analogous case of *Bowlby v. Thunder*, 105 Pa. St. 173: "Not a word herein indicates an intention to qualify or change the absolute devise which he had made to her." The language is no stronger than that in *Jauretche v. Proctor*, 48 Pa. St. 466, that "she is

not to divest herself of what I may leave her, until after her death"; and "at the death of my wife, what I may have left her, that is to say, the residue, is to be divided," etc. "The paramount thought," says Chief Justice Woodward, "was to make his wife absolute owner of his estate, and he expressed this thought by sufficient words; but the particular thought was to take away from her one of the incidents of absolute ownership; in other words, that he would grant a fee with power of testamentary disposition, but would withhold the power of alienation." And this endeavor to restrict the use of the property was held inoperative. So here the testator gave an absolute fee, with express powers to consume or convey. He did not devise the unconsumed residue himself, but desired his wife to do so. He put his request in strong words, ordinarily importing command, but so used as to indicate only an intent, not to reduce the estate previously given, but to control one of its incidents. Where that is the intent, no words, however strong, amount to more than a request, which cannot be enforced by law.

Judgment reversed.

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**DEVISE — WHAT WORDS PASS A FEE.** — Where there is an absolute devise of realty or bequest of personalty, a subsequent clause in the will expressing a wish, desire, or direction for its disposition after the devisee's or legatee's death will not limit the devise or legacy to a life estate; *Bills v. Bills*, 80 Iowa, 269; 20 Am. St. Rep. 418, and note; see *McIntyre v. McIntyre*, 123 Pa. St. 329; 10 Am. St. Rep. 529, and note.

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## KEHLER v. SCHWENK.

[144 PENNSYLVANIA STATE, 243.]

**MASTER AND SERVANT — NEGLIGENCE.** — The test of liability of an employer to an employee for injury received in the course of the employment is negligence, and not danger.

**MASTER AND SERVANT — DUTY TO FURNISH SAFE MACHINERY.** — An employer is bound to furnish machinery and appliances of ordinary character and reasonable safety, and the former is the conclusive test of the latter.

**MASTER AND SERVANT — MACHINERY IN GENERAL USE — EMPLOYER'S DISCRETION.** — Where there are several appliances in general use for the performance of a particular kind of work, the choice between them being a matter of judgment depending on surrounding conditions, an employer has the absolute discretion to select according to his own judgment.

**NEGLIGENCE OF INFANT — CAPACITY AND DISCRETION.** — The measure of the responsibility of a child for negligence is his capacity to see and appreciate danger, and in the absence of clear evidence of a lack of it, he will be

held to such measure of discretion as is usual in those of his age and experience. Such measure makes no sudden leap at the age of fourteen, but varies with each additional year, and the increase of responsibility is gradual.

**NEGLECT OF INFANT — PRESUMPTION.** — The age of fourteen years is simply the convenient point at which the law changes the presumption of capacity to avoid danger, and puts upon an infant the burden of showing his personal want of intelligence, prudence, foresight, or strength usual in those of that age, to excuse his negligence.

**CASE** to recover for personal injury. The plaintiff, Daniel Kehler, between fourteen and fifteen years of age, was employed at defendants' colliery. He was ordered out by defendants to assist with a dump-car, and obeyed under objection. The car was run to the dump by hitching a mule to it by a chain hooked under the bottom of the car. This work was usually performed by boys, and while plaintiff was so engaged, and was in the act of detaching the chain from the car, he received the injury complained of. The evidence showed that there were different methods of hitching to such cars in use at different collieries, one known as the side-hitch, which hooked at the side of the car, while another was known as the center hitch, to hook in front of the car, both of which were less dangerous than the method employed by the defendants. Judgment for plaintiff, and defendants appealed.

*W. H. M. Oram, S. P. Wolverton, W. B. Faust, and C. M. Clement,* for the appellants.

*O. R. Savidge and Voris Auten,* for the appellee.

**MITCHELL, J.** We have had occasion several times recently to lay down the rule that the test of liability of an employer to an employee for injury received in the course of the employment is not danger, but negligence. The employer is bound to furnish machinery and appliances that are of ordinary character and reasonable safety, and the former is the conclusive test of the latter. Whatever is according to the general, usual, and ordinary course adopted by those in the same business is reasonably safe within the meaning of the law. As said by our brother Green in *Northern Central R'y Co. v. Husson*, 101 Pa. St. 1, 47 Am. Rep. 690, an employer is not liable "because a particular accident might have been prevented by some special device or precaution not in common use"; and by our brother Williams in *Iron Ship-Building Works v. Nuttall*, 119 Pa. St. 149: "It is not enough that some persons regard it as a valuable safeguard. The test is general use." Nor can the

jury be permitted to set up their judgment against the general customs of the business: *Titus v. Bradford etc. R. R. Co.*, 136 Pa. St. 618; 20 Am. St. Rep. 944. In the present case, it was in undisputed evidence that there were three kinds of hitches to the dumper in common use, each having its own peculiar advantages, adapted to different conditions of the dirt-bank. Much evidence was given as to whether it would not have been practicable and better, under the conditions of this colliery, to use the side-hitch, or the box center-hitch. This question, though made the burden of the contest, was entirely irrelevant. It was exclusively for the determination of the defendants themselves. Where, as in the present case, the evidence shows clearly that several methods are in general use, the choice being a matter of judgment depending on the surrounding conditions, the owner has the absolute discretion to select according to his own judgment. The necessary control of his own business demands that this right shall be strictly maintained. Except to make another man's will for him after his death, there is nothing which a jury is more apt to think it can do better than the owner, especially under the stress of a claim for damages by one who has been injured, than to say how another man's business ought to have been managed, and nothing in which juries should be held more strictly and unflinchingly within their proper province. As already said, there was a large amount of evidence as to the superiority of the side or upper hitch, the admission and discussion of which tended naturally to lead the jury to suppose that they might find a verdict on their own judgment which was the best; and this was put explicitly before them by the charge that "the proper question for you to determine is as to which of these hitches was the proper hitch for these parties to make use of at this colliery." This was giving the jury an entirely erroneous view of the point of the case, and of their province in regard to it. They should have been told that if they found from the evidence that the lower hitch was the one in general use upon dirt-banks with an up-grade, there was no negligence in the use of that hitch by the defendants. The ninth assignment of error must be sustained.

As the case is to go back for another trial, we may also say that the measure of damages quoted in the eighth assignment is somewhat vague, and the expression, "You would not be willing to lose your arm for the world, or for the wealth of a Vanderbilt," though followed by the caution that that would be

no test of value, was an undesirable form of putting the matter to the jury, and tended to inflame damages in a class of cases where juries are prone enough to measure verdicts by sympathy with the injured, more than by regard for the strict right of the parties.

The error complained of in the second and fourth assignments is, in brief, the charge that while the law presumes a boy of fourteen to be capable of appreciating danger, and therefore responsible for his own negligence, yet he is not to be held to the same degree of prudence as a man of mature years. It is notable that in the legion of cases upon negligence in our books this particular question has received little attention. But the principles upon which it must be settled are firmly established. All the cases agree that the measure of a child's responsibility is his capacity to see and appreciate danger; and the rule is, that in the absence of clear evidence of lack of it, he will be held to such measure of discretion as is usual in those of his age and experience. This measure varies, of course, with each additional year, and the increase of responsibility is gradual. It makes no sudden leap at the age of fourteen. That is simply the convenient point at which the law, founded upon experience, changes the presumption of capacity, and puts upon the infant the burden of showing his personal want of the intelligence, prudence, foresight, or strength usual in those of such age. The standard remains the same, to wit, the average capacity of others in his condition. That this is the rule as to children under fourteen is held in all our cases from *Rauch v. Lloyd*, 31 Pa. St. 358, 72 Am. Dec. 747, to *Sandford v. Hestonville etc. R. R. Co.*, 136 Pa. St. 84. That it also applies to infants over fourteen follows from the same reasoning, and is expressly ruled in *Oakland R'y Co. v. Fielding*, 48 Pa. St. 320. In that case, plaintiff's son, a youth between sixteen and seventeen, while running with a fire-engine, stepped into a hole in the street, fell, and was run over. The judge charged the jury, upon the point of contributory negligence, that they must consider "the age, strength, size, and activity of the plaintiff's son, and if it was the habit of boys of his age and capacity to run with engines to a fire, and to assist in drawing them, the jury may take the fact into consideration in determining whether or not the plaintiff's son was guilty of negligence or misconduct. The plaintiff's son was bound to exercise the same degree of caution, prudence, and discretion that other boys of his age and capacity ordinarily exercise. If he did

this, he was exercising ordinary care and prudence; but if not, he was guilty of negligence." This was affirmed upon reasons given by the judge below. *Nagle v. Allegheny etc. R. R. Co.*, 88 Pa. St. 35, 32 Am. Rep. 418, much relied on by appellant, is in entire harmony with the foregoing. In that case a boy of fourteen ran across a railroad track without looking, and the court held that this was negligence *per se*, and sustained a nonsuit. "At fourteen," says Paxson, J., "an infant is presumed to have sufficient capacity and understanding to be sensible of danger, and to have the power to avoid it; and this presumption ought to stand until it is overthrown by clear proof of the absence of such discretion and intelligence as is usual with infants of fourteen years of age."

In the present case, there was evidence that the unhitching of a dumper of this kind was manifestly dangerous; and on the other hand, that it was entirely safe and commonly performed by boys. It is quite clear that the amount of danger depended very largely on the length and weight of the chain, the condition of the track, and the speed of the mule. These factors made up a varying standard which was necessarily for the jury to determine, and the judge was right in leaving it to them, and in the rule of law which he gave for their guidance.

The other points were based upon the assumption that the evidence was undisputed, and included a peremptory direction in defendants' favor. The learned judge was right in refusing them, for that reason.

Judgment reversed, and *venire de novo* awarded.

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**MASTER AND SERVANT — TEST OF MASTER'S LIABILITY TO SERVANT — NEGLIGENCE, NOT DANGER.** — When a master directs a servant to do some dangerous act which could be made safe by special care on the part of the master, the servant may assume that such care will be taken, and the master will be liable for negligence in not taking such care: *Harrison v. Detroit etc. R. R. Co.*, 79 Mich. 409; 19 Am. St. Rep. 180, and note; *Woodward v. Shumpp*, 120 Pa. St. 458; 6 Am. St. Rep. 716. To entitle a servant to recover for injury he must prove negligence or omission of duty on the part of the master: *Wormell v. Maine etc. R. R. Co.*, 79 Me. 397; 1 Am. St. Rep. 321, and note; *Lindall v. Bode*, 72 Cal. 245.

**MASTER AND SERVANT — DUTY OF MASTER TO FURNISH MACHINERY IN GENERAL USE.** — The unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business: *Titus v. Bradford etc. R. R. Co.*, 136 Pa. St. 618; 20 Am. St. Rep. 944, and note. A master is bound to furnish ordinary machinery, reasonably safe for the work to be done: *Auperstein v. Jones*, 139 Pa. St. 183; 23 Am. St. Rep. 174, and note; note to *Bajus v. Syracuse etc. R. R. Co.*, 57 Am. Rep. 727; extended note to

*Kelley v. Silver Spring Co.*, 34 Am. Rep. 921; extended note to *Barnes v. Laconia Mfg. Co.*, 77 Am. Dec. 218.

**MASTER AND SERVANT — MASTER'S LIABILITY TO INFANT EMPLOYEE.** — A master is not liable for risks assumed by a minor servant if the servant has sufficient capacity to take care of himself, and knows and can properly appreciate the risk: *Huckley v. Herandowsky*, 133 Ill. 359; 23 Am. St. Rep. 618, and note; *Rhodes v. Georgia R. R. etc. Co.*, 84 Ga. 320; 20 Am. St. Rep. 382, and note, with cases collected.

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## **WHEELER AND WILSON MFG. CO. v. AUGHEY.**

[144 PENNSYLVANIA STATE, 303.]

**AGENCY — AFFIRMANCE OF AGENT'S UNAUTHORIZED ACT — NEGOTIABLE INSTRUMENTS.** — Where an agent procures the signature of a third person to a note payable to his principal, upon certain conditions, the principal, by accepting and affirming the note, takes it subject to the conditions upon which it was obtained by his agent, whether or not the latter had authority to make or agree to such conditions.

**ACTION** on four notes signed by defendant, who alleged that he was induced to sign them by false representations made to him by one Landis, agent for the plaintiff company. Landis falsely represented that he was not indebted to said company, that the notes were desired by it as collateral security for certain sewing-machines to be furnished by it to Landis. The machines were not furnished, and the notes were used by the company to secure a prior indebtedness of Landis for machines previously furnished him by said company. Judgment for defendant, and plaintiff appealed.

*F. M. M. Pennell, John M. Gest, W. P. Gest, John Sparhawk, Jr., and Atkinson*, for the appellant.

*Alfred J. Patterson, J. Howard Neely, and Jeremiah Lyons*, for the appellee.

**GREEN, J.** The learned court below distinctly charged the jury that if the notes in suit were given for a past indebtedness of Landis to the plaintiff, their verdict should be in favor of the plaintiff; but if they found that they were given for machines to be furnished thereafter, and the machines were not delivered, the verdict should be for the defendant. The jury found for the defendant, and thereby determined that the notes were given for machines to be furnished in the future. There was abundant testimony in support of the defendant's contention, and we must therefore regard it as an established fact



that the notes were given in consideration that machines should be delivered to Landis by the plaintiff subsequently to the execution and delivery of the notes in question. It is beyond all question that Landis obtained the signature of the defendant to the notes, and that he delivered the notes so signed to the plaintiffs, who received and kept them, and affirmed their title to them by bringing suit upon them against the defendant. For the purpose of obtaining the notes, Landis most certainly acted as the representative of the plaintiffs, and they conclusively accepted the fruits of his act. That they cannot do this without being subject to the conditions upon which he obtained the notes, whether he had authority or not to make or agree to those conditions, is too well settled to admit of any doubt.

The whole doctrine was well expressed by Sharswood, J., in the case of *Mundorff v. Wickersham*, 63 Pa. St. 87, 8 Am. Re. 531: "If an agent obtains possession of the property of another, by making a stipulation or condition which he was not authorized to make, the principal must either return the property, or if he receives it, it must be subject to the condition upon which it was parted with by the former owner. This proposition is founded upon a principle which pervades the law in all its branches: *Qui sentit commodum sentire debet et onus*. The books are full of striking illustrations of it, and more especially in cases growing out of the relation of principal and agent. Thus where a party adopts a contract which was entered into without his authority, he must adopt it altogether. He cannot ratify that part which is beneficial to himself and reject the remainder; he must take the benefit to be derived from the transaction *cum onere*."

This doctrine is so reasonable and so entirely just and right in every aspect in which it may be considered, and it has been enforced by the courts with such frequency and in such a great variety of circumstances, that its legal soundness cannot for a moment be called in question.

It is of no avail to raise or discuss the question of the means of proof of the agent's authority. The very essence of the rule is, that the agent had no authority to make the representation, condition, or stipulation, by means of which he obtained the property, or right of action of which the principal seeks to avail himself. It is not because he had specific authority to bind his principal for the purpose in question that the principal is bound, but notwithstanding the fact that he had no such

authority. It is the enjoyment of the fruits of the agent's action which charges the principal with responsibility for his act. It is useless, therefore, to inquire whether there is the same degree of technical proof of the authority of the agent, in the matter under consideration, as is required in ordinary cases where an affirmative liability is set up against a principal by the act of one who assumes to be his agent. There the question is as to the power of the assumed agent to impose a legal liability upon another person; and in all that class of cases, it is entirely proper to hold that the mere declarations of the agent are not sufficient. But in this class of cases the question is entirely different. Here the basis of liability for the act or declaration of the agent is the fact that the principal has accepted the benefits of the agent's act or declaration. Where that basis is made to appear by testimony, the legal consequence is established. Mr. Justice Sharswood, in the case above cited, after enumerating many instances in which the doctrine was enforced, sums up the subject thus: "Many of these cases are put upon an implied authority, but the more reasonable ground, as it seems to me, is, that the party having enjoyed a benefit must take it *cum onere*."

We are of opinion that the learned court below was entirely right in the treatment of this case.

Judgment affirmed in each of these cases.

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**AGENCY — RATIFICATION BY PRINCIPAL OF AGENT'S UNAUTHORIZED ACT.** — One adopting and receiving the benefits of the representations of another must accept their burdens: *Eastman v. Provident etc. Ass'n*, 65 N. H. 176; 23 Am. St. Rep. 29, and note; note to *St. Louis etc. Ry Co. v. Bennett*, 23 Am. St. Rep. 190; extended note to *Atlas v. Bartholomew*, 5 Am. St. Rep. 113; extended note to *Persons v. McKibben*, 61 Am. Dec. 83; extended note to *McDowell v. Simpson*, 27 Am. Dec. 343, discussing the ratification of an unauthorized execution of a written instrument. A principal cannot be allowed to accept the benefit of an agent's acts and deny the authority of the agent to make the representations which secured him the benefits: *Albitz v. Minneapolis etc. Ry Co.*, 40 Minn. 476; *Union Mut. etc. Ins. Co. v. Kriebel*, 133 Ill. 368.

## ESTATE OF SMITH.

[144 PENNSYLVANIA STATE, 423.]

**GIFT — WHAT CONSTITUTES.** — The owner of personal property, in order to make a voluntary disposition of it, may, by a proper transfer of the title, make a gift of it directly to the donee, or he may impress upon it a trust for the benefit of the donee; but whether a gift or a trust is intended, if the transaction still remains imperfect and executory, equity will not aid in its enforcement.

**EXECUTORY TRUST IS ONE** in which the limitations are imperfectly declared, and the donor's intention is expressed in such general terms that something not fully declared is required to be done in order to complete and perfect the trust and to give it effect.

**EXECUTED TRUST IS ONE** in which the limitations are fully and perfectly declared.

**GIFTS — IMPERFECT GIFT WILL CREATE TRUST.** — What is clearly intended as a gift, but is imperfect as such, will not be given effect by construing it as a declaration of trust. Equity will not perfect an imperfect gift, nor impute a trust where none was in contemplation.

**GIFT — WHAT CONSTITUTES.** — Nothing can take effect as an assignment or gift which does not manifest an intention to relinquish the right of dominion on one hand and to create it on the other. If such intention exists, a want of consideration is immaterial; but if it does not exist, the transaction is not a gift, but merely a contract.

**TRUSTS AND TRUSTEES.** — When a trust is intended, it will be equally effectual whether the donor transfers the title to a trustee, or declares that he himself holds the property for the purposes of the trust.

**TRUSTS — HOW CREATED.** — No certain form of words is required in the creation of a trust, but the intention must be complete and plainly manifest, and not derived from loose and equivocal expressions of the parties, made at different times and upon different occasions. Any words which indicate with sufficient certainty a purpose to create a trust will be effective in so doing, without the use of the words "trust" or "trustees."

**TRUST — FACTS WHICH CONSTITUTE.** — The facts that a person purchases bonds, payable to bearer, and places them in an envelope containing the indorsement over his initials that they are held "for Tom Smith Kelly," while the entries in the purchaser's account and memorandum-books over his signature show that the bonds were "bought for," "are the property of," and "belong to," his "nephew and godson Thomas Smith Kelly," and that the interest on such bonds was placed to the credit of the latter, together with a declaration made by the purchaser to the father of said Kelly, that "he had laid by or appropriated some bonds for Tom," and the fact that the written declarations of such purchaser were carefully preserved by him until his death, are sufficient to establish his intention to hold the bonds as trustee for his nephew, and to vest the latter with the beneficial ownership of them as against the decedent's residuary legatees.

*John G. Johnson and Frank P. Prichard, for the appellant.*

*E. Hun Hanson and Alfred J. Wilkinson, for the appellee.*

**CLARK, J.** The appellant is the Pennsylvania Company for Insurances on Lives and Granting Annuities, trustee under the will of Thomas Smith, deceased; the appellee, Henry S. Parmalee, guardian of Thomas Smith Kelly, a minor. The proceeding was the adjudication of an account, filed by the trustee under the will of Thomas Smith, of the principal and income of thirteen thousand dollars of Pensacola and Atlantic Railroad Company's coupon bonds, which the said trustees claimed were part of the estate of decedent, and passed to them under his will. The guardian of Thomas Smith Kelly, a minor, appeared before the auditing judge and claimed that the bonds had been held by the testator in trust for said minor, and should be awarded to the latter's guardian. The auditing judge and the judges of the orphans' court sustained the guardian's claim, and awarded him the fund.

The owner of personal property, in order to make a voluntary disposition of it, may, by a proper transfer of the title, make a gift of it direct to the donee, or he may impress upon it a trust for the benefit of the donee. It is well settled, however, that whether a gift or a trust is intended, if the transaction still remains imperfect and executory, equity will not aid in its enforcement. The expression of a mere intention to create a trust, therefore, without more, is insufficient; like a promise to give, it will not be enforced in equity; *Dipple v. Corles*, 11 Hare, 183; *Helfenstein's Estate*, 77 Pa. St. 328; 18 Am. Rep. 449. Almost all trusts are in a certain sense executory. Ordinarily, a trust cannot be executed except by conveyance; there is, in most cases, something to be done. But this is not the sense in which a trust is said to be executory. An executory trust, properly so called, is one in which the limitations are imperfectly declared, and the donor's intention is expressed in such general terms that something not fully declared is required to be done, in order to complete and perfect the trust, and to give it effect. When the limitations of a trust are fully and perfectly declared, the trust is regarded as an executed trust: *Egerton v. Brownlow*, 4 H. L. Cas. 210; *Cushing v. Blake*, 30 N. J. Eq. 689; Pomeroy's Eq. Jur., sec. 1001.

Nor in such case, if it appear that the intention of the donor was to adopt either one of these methods of disposition, will a court resort to the other for the purpose of carrying it into effect. What is clearly intended as a voluntary assignment or a gift, but is imperfect as such, cannot be treated as a

declaration of trust. If this were not so, an expression of present gift would in all cases amount to a declaration of trust, and any imperfect gift might be made effectual simply by converting it into a trust. There is no principle of equity which will perfect an imperfect gift, and a court of equity will not impute a trust where a trust was not in contemplation: *Milroy v. Lord*, 4 De Gex, F. & J. 264-274; *Flanders v. Blandy*, 45 Ohio St. 108. Upon the same ground, it has been held that a paper of a testamentary character, but invalid for want of proper execution, cannot be enlarged or converted into a declaration of trust: *Warriner v. Rogers*, L. R. 16 Eq. 340. In *Richards v. Delbridge*, L. R. 18 Eq. 11-13, it was held, overruling *Morgan v. Malleson*, L. R. 10 Eq. 475, and *Richardson v. Richardson*, L. R. 3 Eq. 686, that to create a trust there must be the expression of an intention not to create a present gift, but to become a trustee. See also *Milroy v. Lord*, 4 De Gex, F. & J. 264-274; Brett's Lead. Cas. 58; *Long's Appeal*, 86 Pa. St. 196. Although the cases may not be altogether consistent, the rule is now, we think, well settled in accordance with the doctrine declared in *Richards v. Delbridge*, L. R. 18 Eq. 11-13, that if the transaction is intended to be effected by gift, the court will not give it effect by construing it as a trust. It is well settled that nothing can take effect as an assignment or gift which does not manifest an intention to relinquish the right of dominion on one hand and to create it on the other. If the donor has perfected his gift as he intended, and has placed the subject beyond his power or dominion, the want of consideration is immaterial; the donee's right will be enforced. A gift can only be effectual after the intention to make it has been accompanied by delivery of possession or some equivalent act; if it is not, the transaction is not a gift, but a contract merely.

If a trust is intended, it will be equally effectual whether the donor transfer the title to the trustee, or declare that he himself holds the property for the purposes of the trust. "It is well settled that the owner of personal property may impress upon it a valid present trust, either by a declaration that he holds the property in trust, or by a transfer of the legal title to a third party upon certain specified trusts. In other words, he may constitute either himself or another person trustee. If he makes himself trustee, no transfer of the subject-matter of the trust is necessary; but if he selects a third party, the subject of the trust must be transferred to him

in such mode as will be effectual to pass the legal title": *Bispham's Equity*, 78; *Perry on Trusts*, sec. 96-98; *Hill on Trustees*, 117 et seq.; *Dickerson's Appeal*, 115 Pa. St. 210, 2 Am. St. Rep. 547. In *Richards v. Delbridge*, L. R. 18 Eq. 11-13, Sir George Jessel said: "A man may transfer his property without valuable consideration in one of two ways: he may either do such acts as amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership, in which case, the person who by those acts acquires the property takes it beneficially or on trust, as the case may be; or the legal owner of the property may, by one or other of the modes recognized as amounting to a valid declaration of trust, constitute himself a trustee, and without an actual transfer of the title, may so deal with the property as to deprive himself of its beneficial ownership, and declare that he will hold it from that time forward in trust for the other person." *Heartley v. Nicholson*, L. R. 19 Eq. 233, is to the same effect. If the donor makes a third party a trustee, he must transfer to him the subject of the trust in such mode as will be effectual to pass the title. The transaction, as in the case of a gift, to be effectual, must be accompanied by delivery of the subject of the trust, or by some act so strongly indicative of the donor's intention as to be tantamount to such a delivery; but where the donor makes himself the trustee, no transfer of the subject-matter is necessary. *Ex parte Pye*, 18 Ves. 140; *Donaldson v. Donaldson*, Kay, 711, and *Crawford's Appeal*, 61 Pa. St. 52, 100 Am. Dec. 609, are illustrations of trusts in this form. In such cases, no assignment of the legal title is required, for the nature and effect of the transaction is, that the legal title remains in the donor for the benefit of the donee. It is conceded that as the bonds of the Pensacola and Atlantic Railroad Company, the bonds in question, were not delivered to Thomas Smith Kelly by Thomas Smith, the transaction cannot be sustained as a gift. It is clear that a gift was not in contemplation, and the only question for our determination is, whether or not a complete and valid trust was created, for a trust would seem to have been contemplated.

There is no certain form required in the creation of a trust. In the case of personal property or choses in action, trusts may be proved by parol. If the declaration be in writing, it is not essential, as a general rule, that it should be in any particular form. It may be couched in any language which is sufficiently expressive of the intention to create a trust. "Three

things, it has been said, must concur to raise a trust; sufficient words to create it, a definite subject, and a certain or ascertained object; and to these requisites may be added another, viz., that the terms of the trust should be sufficiently declared": Bispham's Equity, 65, citing *Crawys v. Colman*, 9 Ves. 823; *Knight v. Boughton*, 11 Clark & F. 518. The intention must be a complete one, and this requisite is especially applicable to trusts created by voluntary dispositions. "A mere inchoate and executory design is not enough, and unless there is some distinct equity, as fraud, for example, it cannot be enforced": Bispham's Equity, 65. The intention must be plainly manifest, and not derived from loose and equivocal expressions of parties, made at different times and upon different occasions; but any words which indicate with sufficient certainty a purpose to create a trust will be effective in so doing. It is not necessary that the terms "trust" and "trustee" should be used. The donor need not say in so many words, "I declare myself a trustee," but he must do something which is equivalent to it, and use expressions which have that meaning; for however anxious the court may be to carry out a man's intention, it is not at liberty to construe words otherwise than according to their proper meaning: *Richards v. Delbridge*, L. R. 18 Eq. 11-13. In *Heartley v. Nicholson*, L. R. 19 Eq. 233, Vice-Chancellor Bacon says: "It is not necessary that the declaration of a trust should be in terms explicit, but what I take the law to require is, that the donor should have evinced by his acts, which admit of no other interpretation, that he himself had ceased to be, and that some other person had become, the beneficial owner of the subject of the gift or transfer, and that such legal right of it, if any, as he retained was held in trust for the donee." "The one thing necessary," says the same learned judge in *Warriner v. Rogers*, L. R. 16 Eq. 340, "to give validity to a declaration of trust, the indispensable thing, I take to be that the donor or grantor, or whatever he may be called, should have absolutely parted with that interest which had been his up to the time of the declaration, —should have effectually changed his right in that respect, and put the property out of his power, at least in the way of interest." The acts or words relied upon must be unequivocal, plainly implying that the person holds the property as trustee: *Martin v. Funk*, 75 N. Y. 134; 31 Am. Rep. 446. Therefore, in *Young v. Young*, 80 N. Y. 422, 36 Am. Rep. 634, where the



donor signed a paper certifying simply that certain bonds belonged to his sons, but did not declare in any words of plain import that he held them in trust for them, the declaration was held to be insufficient. In *Helpenstein's Estate*, 77 Pa. 323, 18 Am. Rep. 449, Mr. Justice Sharswood says: "There is no prescribed form for the declaration of a trust. Whatever evinces the intention of the party that the property of which he is the legal owner shall beneficially be another's is sufficient."

In the case at bar, the subject of the alleged trust is certain; the *cestui que trust* is particularly designated by name and identified, whilst the terms are specific and sufficiently shown. The contention is, however, that a trust upon these terms was not sufficiently declared; that the whole matter rested in the undeclared and unexecuted intention of the donor, and was, therefore, wholly without effect.

Thomas Smith, although a married man, had no children. He was the owner of a large estate, the personalty alone aggregating about one million dollars. Thomas Smith Kelly was his nephew, his godson, and namesake; and although his father and mother were both living, he lived with and was maintained and educated by his uncle from the age of three years until the time of the decedent's death on the 20th of May, 1883, when he was about thirteen years of age. His uncle admittedly stood *in loco parentis*, which would seem to furnish a sufficient motive for making this disposition of the bonds, and would have like effect generally to that which attends the relation of parent and child: *Ex parte Pye*, 18 Ves. 146. The bonds were purchased on the 28th of January, 1882, and the death of the decedent occurred on the 20th of May, 1883. A year or more before his decease, which was presumably near the time when the bonds were purchased, Thomas Smith, in a conversation with John H. Kelly, the father of Thomas Smith Kelly, stated "he had laid by or appropriated some bonds for Tom." After his death, when his box in the trust company's vaults was opened, the bonds in question were found amongst his assets. The envelope in which they were contained was indorsed: "13 bonds, \$1,000 each, held for Tom Smith Kelly. [Signed] T. S. Pensacola & Atlantic R. R. mortgage bonds." The envelope contained bonds of that description and amount. In the decedent's account-book was an entry in his own handwriting, as follows:—

**Account Thomas Smith Kelly.**

**Pensacola and Atlantic Railroad Company Mortgage Bonds.**

**1882.**

**Jan. 28.** To cash paid E. W. Clark and Kimball for \$16,000 bonds at 95, and interest from August 1, 1881 . . . . . \$15,189 83  
**Less** Nos. 1223, 1224, 1225, \$3,000, sold William Simpson, Jr., same day at same price, \$3,000 \$2,850 00

Balance \$13,000, cost . . . . . \$12,339 83

\$13,000 of these bonds I bought for, and are the property of, my nephew and godson, Thomas Smith Kelly, and belong to him. THOMAS SMITH.

**PHILADELPHIA, January 28, 1882.**

**Cr.**

**1881.**

**August 1.** Due and payable August 1, 1921, coupons due August 1st and February 1st, six per cent per annum on New York. Principal and interest guaranteed by the Louisville Railroad Company. Bonds, \$16,000, \$1,000 each, Nos. 1223-1238, both inclusive.

**1882**

**Aug. 10.** Thomas Smith Kelly, interest collected for him . . . . . \$390 00

**1883.**

**Feb. 1.** Cash coupons paid M. E. Smith for Tom S. K. . . . . \$390 00

It also appears that the decedent kept a pocket memorandum-book, in which he jotted down his monetary transactions as they took place, and in January of each year made a summary of his investments. In the latest statement of this character in the book, dated shortly before his death, the sum total was \$1,000,000, and included in the items making up that total was, "\$13,000 Pensacola and Atlantic bonds." Under the head of income for 1883, in the same book, was noted \$390 interest on these securities. Opposite to the entry of the bonds was the word "Tom," in testator's handwriting. The entry had a red line drawn through it, which line was afterwards scratched out by the testator, and the entry was written in again by him. It was explained that a nephew had drawn the line

through at testator's request, because the testator had intended to enter the item elsewhere.

Was not all this, taken together, a sufficient and clear declaration of trust in favor of the nephew? The decedent, as we have seen, in his lifetime, in his own handwriting, and over his own initials and signature, declared that these bonds, thus set apart and "appropriated or laid by" for his nephew, not only were the "property of his nephew," and "belonged to him," but they were "bought for" and "held for him." In the absence of the precise terms "in trust," it is difficult to suggest words more expressive of a trust than the words thus employed. Their meaning is so obvious and certain that there can be no doubt of the decedent's intention.

But it is said that this intention was not properly declared; that the words were written upon the envelope and in the private account-book of the decedent, and it is not shown that these entries and indorsements were witnessed by or were ever exhibited to any one; that they were mere private memoranda which were wholly within the power of the donor, and which in his lifetime he might have revoked, canceled, or destroyed. The argument of appellant's counsel is, that a "declaration" of trust involves the idea that the donor must declare his assumption of the trust; in other words, that he must say something, or write something, or exhibit something to some other person, or to the world at large. "If he stands alone," say the learned counsel, "in a room, and repeats his intention to himself, that is not a declaration. If he writes a memorandum, not intended to be shown to any one during his lifetime, that is not a declaration. It may be a testamentary disposition, if he looks forward to its discovery and inspection after death; but it cannot be a declaration of trust, if he does not intend to communicate it in his lifetime. As in gifts there must be a delivery, so in declarations of trust there must be something equivalent to a delivery, to wit, a declaration made to some other person or to the world at large, which constitutes the donor at once a trustee, and conveys to the *cestui que trust* an immediate equitable interest.

It is admitted that the declaration need not be made to the *cestui que trust*; that if made to other persons, under circumstances indicating the intention of the donor to make a declaration, it is sufficient. It is conceded, also, that but little publicity is required, and that the donor may retain the paper

in his possession; but it is contended that the declaration must of necessity be made to some one besides himself.

It may be conceded that if a man, being alone, merely repeat his purpose to himself, that would not be a declaration, for it is obvious that as his utterance was not intended for other ears than his own, it was merely the expression of an intention. It may also be conceded, that if, under such circumstances, he were to have written his purpose formally upon paper, and added his signature and seal, he might the next moment have destroyed it. The trust, in such case, would take effect whenever it appeared that the instrument was executed as the deliberate expression of his purpose, and this may be shown by his acts or declarations respecting it, or by circumstances tending to establish the fact.

The purpose of Thomas Smith, with reference to these bonds, was not only written and authenticated by his initials or signature, but the writing was carefully preserved until the time of decedent's death. The envelope containing the bonds in question had an informal declaration indorsed thereon that the bonds were held for Tom Smith Kelly; the account-book showed, not only that they were bought for his nephew, but that they belonged to him,—they were his property. For whose inspection were those written declarations intended? Certainly not for the inspection of the donor, but for those who might have occasion at any time in the future to investigate his affairs. The donor was advanced in years, and was subject to the ordinary ills, accidents, and misfortunes of life, both physically and mentally. He was liable, although living, to be incapacitated for all business affairs, or he might be removed by death. In any event, his purpose would seem to have been to leave a memorandum for the eyes of others, exhibiting his intention and purpose with respect to these bonds. It is unnecessary for us to consider whether or not the donor might have revoked the declaration. He did not revoke it; he put it away with the bonds themselves, and carefully preserved it. He collected the interest semi-annually, and in recognition of the existing trust, placed the several amounts to the credit of the donee. It is not essential to the validity of a trust of personal property that it should be irrevocable; indeed, a right of revocation may be expressly reserved: *Dickerson's Appeal*, 115 Pa. St. 198; 2 Am. St. Rep. 547; *Lines v. Lines*, 142 Pa. St. 149; 24 Am. St. Rep. 487. The question in such case is not so much whether in the lifetime of the decedent the declara-

tion was actually exhibited to the inspection of others, as whether, under all the circumstances of the case, it would appear to have been written and preserved for the inspection of others. If the declaration had been a formal one, under the hand and seal of the declarant, upon proof of its execution we think its effectuality would not have been questioned, even though it never had been exhibited to the *cestui que trust* or to any other person; and we cannot see that the informal nature of the writing could alter its effect, if the donor's intention is otherwise clearly established.

There was no provision for the assignment of the bonds of the Pensacola and Atlantic Railroad Company on the books of the company. They were simply ordinary coupon bonds, transferable by delivery. A formal assignment was unnecessary to transfer the title. The rights of creditors do not intervene. The appellants stand in the shoes of the testator, and their rights do not rise superior to his. Whilst a gift, in its proper legal acceptation, was not contemplated by Thomas Smith, it is plain that his purpose was to vest the equitable ownership of these bonds in his nephew, and to apply the interest for his benefit. In the language of the president judge of the orphans' court, his "declarations and subsequent acts, evidenced by his admissions and solemn entries in his books, and the indorsement upon the envelope containing the bonds, furnish incontrovertible proofs of his intention to hold them as a trustee."

In *Crawford's Appeal*, 61 Pa. St. 52, 100 Am. Dec. 609, Crawford, who was indebted to his wife about six hundred dollars, said to her: "I have added three thousand dollars to your little money"; and it appears that on the 9th of May, 1864, the book-keeper, by his direction, made an entry of three thousand dollars additional to her credit on the books. The book-keeper was directed to enter the credit simply "for cash received." It does not appear that any declaration of trust was communicated to him by Crawford, or, in fact, that a trust was expressly declared to any other person. Mrs. Crawford at no time afterwards received any portion of the principal or interest of the money standing to her credit, but interest was from year to year credited upon it. After the husband's death, on the distribution of his estate, the widow claimed this three thousand dollars with the accrued interest. It was held by this court that her claim could not be supported as a gift, but it was sustained upon the footing of a

**trust.** We are of opinion, upon similar grounds, that the railroad bonds were, in this instance, intended, not as a present gift, for the testator retained the possession of them, and exhibited no intention whatever of parting with them; on the contrary, he expressly declared in writing that he "held" them for Thomas Smith Kelly, for whom he had bought and paid for them, and that the bonds were his property. Completeness of the trust is to be judged of not only by what the testator said and what was written, but by what the testator did. He did not read the declaration to others, but he put it away with the bonds in his box in the trust company's vaults, and carefully preserved it, and he received and properly applied the interest, circumstances which give rise to the reasonable implication that the writing was intended for the eyes of others, and not merely for his own.

We are of opinion that the trust is fully established, and the decree of the orphans' court is affirmed, and the appeal dismissed at the costs of the appellant.

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**GIFTS — EQUITY TO ENFORCE IMPERFECT GIFT.** — A court of equity will not compel a donor's personal representatives to complete an imperfect gift by the doing of an act which the donor, if living, might have refused to do: *Appeal of Walsh*, 122 Pa. St. 177; 9 Am. St. Rep. 83, and note.

**GIFT — WHAT CONSTITUTES.** — A gift of a chattel is the act of transferring the right and possession thereto, whereby one man renounces, and another acquires, immediately all right and title to the gift: *McWillie v. Van Vacter*, 35 Miss. 428; 72 Am. Dec. 127, and note.

**TRUSTS — EXECUTORY — WHAT ARE.** — An executory trust is one where the beneficiary is not yet clothed with the equitable title, but has a mere right to have some act done which will vest in him such equitable title: *Nicoll v. Ogden*, 29 Ill. 323; 81 Am. Dec. 311, and note.

**TRUSTS — HOW CREATED.** — Writing is not essential to the creation of a trust; but the statute of frauds requires that its terms and conditions must be clearly manifested and proved, in writing, under the hand of the party to be charged, before the court will carry it into execution: *Steere v. Steere*, 5 Johns. Ch. 1; 9 Am. Dec. 256. Where a person indebted to another in a certain sum of money writes to him, recognizing the indebtedness, and telling him that he will keep the money until he deems him capable of taking care of it, that he will keep it on interest for him, this is sufficient for the creation of a valid trust: *Hamer v. Sidway*, 124 N. Y. 538; 21 Am. St. Rep. 603, and note.

**TRUSTS — DONOR MAY CONSTITUTE HIMSELF TRUSTEE.** — The owner of personal property may impress upon it a valid trust, either by a declaration that he holds the property in trust, or by a transfer of the legal title to a third person upon specified trusts: *Dickerson's Appeal*, 115 Pa. St. 198; 2 Am. St. Rep. 547; *Schluter v. Bowery Sav. Bank*, 117 N. Y. 125; 15 Am. St. Rep. 494.

**HENDERSON v. PHILADELPHIA AND READING R'Y Co.**

[144 PENNSYLVANIA STATE, 481.]

**NEGLECT — RAILROADS — LIABILITY OF, FOR FIRE.** — In an action for loss by fire caused by sparks from the locomotive-engine of a railroad company, negligence on the part of the company is the gist of the action, and the burden of proof is upon the plaintiff to prove it. The mere fact of the existence of the fire will not charge the company with either negligence or want of skill.

**RAILROADS — LIABILITY FOR FIRES — NEGLIGENCE — SPARK-ARRESTERS — PRESUMPTION.** — In case of loss by fire, fairly attributable to sparks from a railroad company's locomotive, the absence of a spark-arrester is *prima facie* evidence of negligence on the part of the company; and although the emission of sparks is not of itself evidence of negligence, the fact that they cause a fire at a considerable distance raises the presumption that the engine is not provided with a sufficient spark-arrester.

**RAILROADS — LIABILITY FOR FIRES — EVIDENCE.** — Where a railroad fire complained of is shown to have been caused, or in the nature of the case could only have been caused, by sparks from an engine, which is known and identified, the evidence should be confined to the condition of that engine, its management, and its practical operation; and evidence tending to prove defects in other engines of the company is irrelevant, and should be excluded. The evidence must also be confined to the operation of the identified engine at or about the time of the occurrence of the fire.

**RAILROADS — LIABILITY FOR FIRES — EVIDENCE.** — In actions to recover for the escape of fire from locomotive-engines, the burden is upon the complainant to prove negligence in their construction, operation, or management. This fact need not be established by direct or positive proof, but may be shown by circumstantial evidence.

**RAILROADS — LIABILITY FOR FIRES — EVIDENCE.** — Where a railroad fire complained of is shown to have been caused, or may have been caused, by sparks from an engine, unknown and unidentified, or by one of several engines, some of which are unidentified, evidence that sparks and burning coals were frequently dropped by engines passing on the same road about the time of the fire in question, and either before or after, is relevant and competent to show habitual negligence on the part of the company, and to make it probable that the damage complained of proceeded from the same cause.

**RAILROADS — LIABILITY FOR FIRES — EVIDENCE.** — In an action to recover for the escape of fire from an unidentified locomotive, evidence that the company's locomotives generally, or many of them, at or about the time of the fire, threw sparks of unusual size and kindled numerous fires upon that part of the road, is admissible to sustain or strengthen the inference that the fire originated from the negligence of the company complained against. Evidence of this character must be limited to about the time of the fire, and if it relates to a period six months preceding the fire or is unlimited as to time, it is inadmissible.

*Gavin W. Hart*, for the appellant.

*P. F. Rothermel, Jr.*, for the appellee.



**CLARK, J.** This action was brought to recover damages for the destruction by fire of the plaintiff's sash and door mill at Montgomery, in Lycoming County. The mill was situate between the Pennsylvania and the Philadelphia and Reading railroads, the former passing in front and the latter in the rear of the mill. The plaintiffs allege that the fire, which occurred on the tenth day of August, 1888, was communicated from sparks emitted by the defendant's engines. The fire was discovered about 6 or 6:15 o'clock, P. M., in the upper part of the ventilator, on the side next the defendant's road. The ventilator was about thirty feet high, and was within twenty-two feet of defendant's road.

The watchman testifies that he came on duty that evening about fifteen minutes before shutting-down time, and that the mill shut down at about 5:30, P. M., mill time, or 5:15 railroad time; that after he came on duty, and before the fire, two trains passed; the first, a coal train going north, drawn by an engine which he could not identify; and about fifteen minutes later, a freight train drawn by engine No. 72. The defendant's evidence, however, showed that two other engines drawing passenger trains passed this point, one at 5:21 and the other at 5:22, P. M., neither of which engines was identified; indeed, it would seem that the plaintiffs did not know they had passed the mill until the fact was developed in the defendant's testimony. The watchman testifies, further, that it was his duty to take notice of the engines as they passed, to see whether they threw fire from the stacks; that he did watch the engine in front of the coal train, and also engine No. 72, and that he saw no sparks; but that as it was only six o'clock, and the sun was shining brightly, there may have been sparks emitted which he did not see. The only engine known and identified was No. 72.

The defendant's contention was, that the fire occurred in the pit containing the shavings and *débris* of the mill, which was immediately underneath the ventilator, and from which the shavings, etc., were supplied as fuel to the furnace. There is a large volume of testimony bearing upon the origin and cause of the fire, upon consideration of which the jury found the fire to have been caused by sparks from the defendant's locomotive-engines.

The Philadelphia and Reading Railroad Company, at the time of the injury complained of, was an incorporated company, entitled to the right of way for its engines, etc., upon

their track, as located in the rear of the plaintiffs' mill. The company, in the proper use of its road, was therefore in the lawful pursuit of a legitimate business, and if injury resulted to the plaintiffs, it is *damnum absque injuria*; the company cannot be mulcted in damages except upon proof of negligence: *Frankford etc. Turnp. Co. v. Philadelphia etc. R. R. Co.*, 54 Pa. St. 345; 93 Am. Dec. 708; *Philadelphia etc. R. R. Co. v. Hendrickson*, 80 Pa. St. 182; 21 Am. Rep. 97. No person is answerable in damages for the reasonable exercise of a right, when the act is done with a cautious regard for the rights of others, and where there is no ground for the charge of negligence, unskillfulness, or malice. For the ordinary risks, the land-owner is compensated in the damages for right of way; negligence, therefore, is the gist of the action, and the burden of proof is upon the plaintiffs to establish it. And as all engines, whether provided with spark-arresters or not, emit sparks, the mere existence of a fire along the line of the road, caused by sparks from the company's engines, is not enough to fasten upon the company the charge either of negligence or want of skill: *Philadelphia etc. R. R. Co. v. Yeiser*, 8 Pa. St. 366. In *Jennings v. Pennsylvania R. R. Co.*, 93 Pa. St. 340, this court in a *per curiam* opinion, said: "To hold that the fact of the fire having taken place was *prima facie* evidence that the spark-arrester was defective, and therefore that the case ought to have been submitted to the jury, would be practically to hold railroad companies liable for all fires; for it is notorious that no spark-arrester has yet been invented to prevent all sparks; and a little spark may kindle as large a conflagration as a large one, it depending very much on the dryness or humidity of the atmosphere whether a spark will go out before reaching the ground, and whether what it reaches is in a condition to be easily ignited." So, also, *Philadelphia etc. R. R. Co. v. Schultz*, 93 Pa. St. 344; *Reading etc. R. R. Co. v. Latshaw*, 93 Pa. St. 449.

Whilst any ordinary fuel may be used in a locomotive-engine for the generation of steam, the exercise of this right is subject to the restriction that the latest improvements in its management in general use shall be applied to it: *Frankford etc. Turnp. Co. v. Philadelphia etc. R. R. Co.*, 54 Pa. St. 345; 93 Am. Dec. 708. It is the duty of the railroad company, in the use of an engine, to use such reasonable precaution as may prevent damage to the property of others; hence, in *Lackawanna etc. R. R. Co. v. Doak*, 52 Pa. St. 379, 91 Am. Dec. 166,

where, although there was no direct evidence that the building was fired by the engine, or that sparks were emitted from it at the time, yet the building was near the railroad, and was discovered to be on fire when the train passed, and it was shown that the engine had no spark-arrester, it was held that the question of negligence was properly submitted to the jury. The effect of this ruling was to establish the principle in Pennsylvania that in case of loss by fire, fairly attributable to sparks from a railroad company's locomotive-engine, the absence of a spark-arrester is *prima facie* evidence of negligence on the part of the company. It is the duty of railroad companies to adopt the best precautions against danger in general use, and which experience has shown to be superior and effectual, and to avail themselves of every such known safeguard or generally approved invention to lessen the danger. But mechanical invention and skill have all provided a merely partial protection against the emission of sparks. The mere fact that sparks are thrown from the stack of an engine is not, therefore, evidence in itself of negligence. Where, however, sparks of large size are emitted, which, carried to a long distance, set fire to fields, fences, or buildings, it may, in the present condition of this branch of mechanical invention, well be inferred that the engine is not provided with a sufficient spark-arrester: *Philadelphia etc. R. R. Co. v. Hendrickson*, 80 Pa. St. 182; 21 Am. Rep. 97; *Pennsylvania Co. v. Watson*, 81\* Pa. St. 293; *Pennsylvania etc. R. R. Co. v. Lacey*, 89 Pa. St. 458; *Philadelphia etc. R. R. Co. v. Schultz*, 93 Pa. St. 341. Therefore, in an action for the recovery of damages for the destruction of a dwelling seventy-seven feet distant from the railroad, where it was shown that sparks were seen flying from engines to a distance of more than fifty yards, and fences and fields were set on fire in several places, about the same time and at considerable distance from the road, the question of negligence, it was held, should have been submitted to the jury. Although the company gave evidence to the effect that their engines were in good order, and were all provided with good spark-arresters, the unusual distance to which the sparks were borne, and the numerous fires they created, were held to be such evidence to the contrary effect as to have carried the case to the jury: *Huyett v. Philadelphia etc. R. R. Co.*, 23 Pa. St. 373.

Where the injury complained of is shown to have been caused, or in the nature of the case could only have been

caused, by sparks from an engine which is known and identified, the evidence should be confined to the condition of that engine, its management, and its practical operation. Evidence tending to prove defects in other engines of the company is irrelevant, and should be excluded: *Erie R'y Co. v. Decker*, 78 Pa. St. 298. In the case cited, the house of the plaintiff, which stood near the track of the defendant's railroad, was destroyed by fire on the 6th of March, 1872. The plaintiff alleged that the fire originated from sparks thrown from locomotive-engine No. 458, belonging to the defendants, which passed his house about the time the fire commenced, and that the throwing of the sparks was from the negligence of the defendants in not having their apparatus in proper order. Mr. Justice Gordon, in the opinion of the court, says: "It appears from the evidence, and it was conceded in the argument, that the only locomotive that could have fired the premises in question was that numbered 458, in charge of Alfred Carpenter as engineer. It follows, therefore, that the condition of this engine and its management were all that were legitimately before the court. If it was properly constructed as to its furnace and smoke-stack, and was furnished with a spark-arresting grate of the proper character, the company would not be liable, though the building were burned by fire accidentally issuing from it: *Lackawanna etc. R. R. Co. v. Doak*, 52 Pa. St. 379; 91 Am. Dec. 166. If, then, this engine was in a proper condition, it mattered not that every other engine owned by the company was without the proper appliances for preventing the ejection of coals and sparks. On the other hand, if this engine was dangerous in this respect, it was of no consequence that all others upon the road were safe. Such being the case, it is manifest that all evidence going to prove defects in engines belonging to this company, other than the one alleged to have produced the injury complained of, was irrelevant to the issue pending, and should have been excluded."

So in *Albert v. Northern Cent. R'y Co.*, 98 Pa. St. 816, where it appeared that the plaintiff's loss, if indeed it was caused at all by the defendant's negligence, was attributable entirely to the escape of sparks at a particular time from one of two particular engines, both of which were identified, evidence was held inadmissible on the part of the plaintiff, in order to prove defendant's negligence, to the effect that sparks of unusual size had been emitted for some time prior to the fire by defendant's engines generally. "The evidence below," said our

Brother Paxson in that case, "established the fact, that if the plaintiff's property was destroyed by fire communicated by defendant's locomotive, it was done by engine No. 21 or engine No. 126, and by no others. Hence it is entirely clear that evidence that other engines, upon some other day, threw out an unusual amount of large sparks and live coals was immaterial, and if received, could only have confused and might have misled the jury; nor would it have been evidence to show that the spark-arresters on engines 21 and 126 were out of order." That is to say, for the last sentence is perhaps a little obscure, the fact that other engines, at other times, threw out an unusual amount of large sparks and live coals would not have been evidence to show that the spark-arresters on engines 21 and 126 were out of order. To the same effect is *Jennings v. Pennsylvania Co.*, 93 Pa. St. 840; *Annapolis etc. R. R. Co. v. Gantt*, 39 Md. 124; and other cases that might be cited.

Of course the inquiry in all such cases is as to the existence or condition of the spark-arrester at the precise time of the injury; but in order to make this practicable by proof that it was defective, or threw out sparks of unusual size, a reasonable latitude must be allowed to show its management and operation both before and after. The evidence, however, must be confined to its operation at or about the time of the occurrence. In *Philadelphia etc. R. R. Co. v. Schultz*, 93 Pa. St. 844, it was shown that every day for two weeks a particular engine had been observed to throw out quantities of unusually large sparks, and had fired property along the line of the railroad. In *Albert v. Northern Cent. R'y Co.*, 93 Pa. St. 816, it was shown that both engines then in question had done this for some time before the occurrence. To the same effect, also, is *Lehigh Val. R. R. Co. v. McKeen*, 90 Pa. St. 122; 35 Am. Rep. 644. Testimony tending to show that other fires were set by the same engine about the same time, however, is the proper rule, and is undoubtedly competent: *Boyce v. Cheshire R. R. Co.*, 43 N. H. 627; *Grand Trunk R. R. Co. v. Richardson*, 91 U. S. 454.

But when the loss or injury is shown to have been caused, or according to the proof may have been caused, by sparks from an engine unknown and unidentified, or by one of several engines, some of which are unknown and unidentified, then the rule of evidence is necessarily somewhat enlarged. The burden of proof in all such cases, in the first instance, is upon the plaintiff to show that the fire in question was communi-

cated from the defendant's engines. "It devolves upon the plaintiff to prove by a preponderance of the evidence that the fire was communicated by sparks or cinders from the railway engines. It need not be shown that any particular engine was at fault, but it will be sufficient if the fire is proved to have been set by any engine passing over defendant's railway, and the evidence may be wholly circumstantial; as, first, that it was possible for fire to reach the plaintiff's property from the defendant's engines; and second, facts tending to show that it probably originated from that cause, and from no other": 8 Am. & Eng. Ency. of Law, 7.

And although the rule is otherwise in England and in many of the states, in Pennsylvania, as we have said, the additional burden is upon the plaintiff to prove negligence in the construction or management of the engine. It is not required that the fact be established by direct or positive proof; like any other fact, it may be established by circumstantial evidence; and on account of the great difficulty in proving negligence in such cases, any proper evidence from which negligence may be inferred is sufficient to throw the burden on the defendant. "A slight presumption of negligence, however, raised by the plaintiff's case," says Mr. Wharton in his Law of Evidence, sec. 871, "is sufficient to throw the burden of disproving negligence on the defendant. It is a mistake, as has been elsewhere shown, to suppose that negligence can be only proved by positive and affirmatory evidence. There may be no direct proofs of negligence, yet the way in which an injury is done may be such that negligence is the most probable hypothesis by which it can be explained; and when this is so, the defendant must disprove negligence by showing that he exercised care." In Thompson on Negligence, 159, it is said: "The business of running railroad trains suggests a unity of management, and a general similarity in the construction of the engines. For this reason, and on account of the difficulty of proving negligence in these cases, as before pointed out, the admission of evidence as to other and distinct fires from the one alleged to have caused the injury is permitted. The rule is adopted in England, and prevails in all the states, with one, or possibly two, exceptions. More particularly, it may be stated as follows: That in actions for damages caused by the negligent escape of fire from locomotive-engines, it is competent for the plaintiff to show that, about the time when the fire in question happened, the trains which the company were

running past the location of the fire were so managed, in respect to their furnaces, as to be likely to set on fire objects in the position of the property burned, or to show the emission of sparks or ignited matter from other engines of the defendant passing the spot upon other occasions, either before or after the damage occurred, without showing that they were under the charge of the same driver, or were of the same construction as the one occasioning the damage." The rule is more precisely stated in Shearman and Redfield on Negligence, sec. 675, as follows: "When the particular engine which caused the fire cannot be fully identified, evidence that sparks and burning coals were frequently dropped by engines passing on the same road upon previous occasions is relevant and competent to show habitual negligence, and to make it probable that the plaintiff's injury proceeded from the same quarter. If the engine which emitted the fire is identified, then evidence on either side as to the condition of other engines, and of their causing fires, has been held irrelevant, but not so if it is not fully identified."

In our own case of *Pennsylvania R. R. Co. v. Stranahan*, 79 Pa. St. 405, the evidence was, that between two and three o'clock in the afternoon, the plaintiff's barn, which was about 150 feet from the railroad, was discovered to be on fire. Two trains had passed about noon. The fire appeared to have commenced at the fence on the road, and burned over the field to the barn. The sparks falling set fire in many other places along the road. The engine from which the sparks were alleged to have been thrown was unknown and unidentified, and the plaintiff proposed to show by a witness, who lived nineteen miles distant on the line of the railroad, the extent to which the locomotives on that road going east, on or about the time of the occurrence, threw sparks from the smoke-stacks. The testimony was admitted. The witness testified that it was "a common occurrence for the engines to throw sparks, and set fire for rods from the railroad track; they were from a pea to a walnut in size; it appeared worse sometimes than others; they were usually freight trains; sometimes passenger trains," etc. The admission of this testimony was assigned for error here. In a *per curiam* opinion this court said: "This was not a case where a certain engine had thrown out the sparks which set fire to plaintiff's barn; but it was where the engine was unknown, yet the cause of the fire was clearly traced to the railroad track, and left the



belief that some one of the engines of the defendant had emitted the coals which set the barn on fire. It therefore became necessary to establish the fact by such proof as rendered the belief a certain fact. This could be done, not by the proof that a certain engine emitted the sparks incessantly; for *non constat* that this particular engine had passed the plaintiff's premises that day. Hence it was necessary to permit the party to show that the emitting of coals and sparks in unusual quantities was frequent, and permitted to be done by a number of engines." In *Gowen v. Glaser*, Penn. Sup. Ct., Apr. 12, 1886, 8 Cent. Rep. 109, the action was for damages for the destruction by fire of the plaintiff's rags, which were scattered in a field adjoining the defendant's road. The allegation was, that they were set on fire by sparks from the defendant's engines, but it was not known by what engine. The offer made was as follows: To show that several engines on this road had insufficient spark-catchers; that the engines of this road had repeatedly set fire to property and to vegetation along that part of the track, very shortly before and very shortly after this occurrence; that sparks as large as a hickory nut escaped in large quantities from the engines, causing these fires; that after this fire, what remained of the rags, and what was saved, were spread on the field and watched day and night, and that they were set on fire repeatedly by the engines passing on this road. This offer was received to show by circumstantial evidence that the damage was done by some engine with an insufficient spark-arrester. The jury were to infer from the fact that many of the company's engines, about the time of this occurrence, shortly before and shortly after, emitted sparks of unusual size and quantity, that they were without sufficient spark-arresters; and that, upon consideration of all the evidence, the injury complained of resulted from some one of the engines thus imperfectly constructed. The offer was subsequently enlarged by adding to it a proposition to prove, not that the whole number of defendant's engines were defective, but that the defendant habitually used engines with defective spark-arresters. The offer, as a whole, was admitted, and in this court was assigned for error. In a *per curiam* opinion, this court held that there was no error in the admission of this offer. In *Pennsylvania R. R. Co. v. Page*, Penn. Sup. Ct., Feb. 20, 1888, 21 Week. Not. 52, the action was for burning the plaintiff's barn, 150 feet distant from the track. The evidence was, that the company's trains had passed the barn shortly

before the fire broke out, emitting cinders, smoke, and small sparks about the size of a pea. There was no evidence, direct or circumstantial, to justify the jury in finding that the sparks were of any larger size. It was further shown that the wind was blowing from the track towards the barn, and that sparks had been known to have been blown that distance. It was not shown that any spark-arrester in use would effectually prevent the emission of sparks of this size. Whilst the evidence was, perhaps, sufficient to satisfy the jury that sparks from the engine had caused the fire, there was no proof of any defect in the spark-arresters; on the contrary, it was shown they were in perfect condition. There was therefore no proof of negligence or mismanagement; and it was upon this ground that we said it would have been the duty of the court below, if a proper request had been made, to instruct the jury to find a verdict for the defendant.

The same rule of evidence is announced in *Grand Trunk R. R. Co. v. Richardson*, 91 U. S. 454. The saw-mill, etc., of Richardson, the plaintiff, was burned on the seventh of June, 1870. The evidence tended to show that the fire was communicated from one of two engines belonging to the company; the first, drawing a passenger-train westerly, passing the mill about half-past one o'clock in the afternoon; the other, drawing a freight train easterly, passing it about four o'clock the same afternoon. One half to three fourths of an hour after the last-mentioned train passed by the mill, the fire was discovered burning on the westerly end of a covered railroad bridge, from which it was communicated to the saw-mill. The evidence of the plaintiff in error tended to show that the fire was not communicated by either of the engines complained of, but, on the contrary, from a constant fire at the end of the tramway, about 163 feet down the stream, on the same bank of the river, maintained at the westerly end of the railroad bridge for the purpose of burning edgings, stickings, slabs, and other waste material from the saw-mill. After the company had rested its case, Richardson was allowed to prove that at various times during the same summer, before this fire occurred, some of the company's locomotives, in an unusual manner, scattered fire in passing the mill and bridge, without showing either that those which it was claimed communicated the fire in question were among the number, or that they were similar in their make, state of repair, or management to said locomotives. The engines were

unknown and unidentified. Mr. Justice Strong, in ruling upon this question, said: "The third assignment of error is, that the plaintiff was allowed to prove, notwithstanding objection by the defendant, that at various times during the same summer, before the fire occurred, some of defendant's locomotives scattered fire when coming past the mill and bridge, without showing that either of those which the plaintiff claimed communicated the fire was among the number, and without showing that the locomotives were similar in their make, their state of repair, or management to those claimed to have caused the fire complained of. The evidence was admitted after the defendant's case had closed. But whether it was strictly rebutting or not, if it tended to prove the plaintiff's case its admission as rebutting was within the discretion of the court below, and not reviewable here. The question, therefore, is, whether it tended in any degree to show that the burning of the bridge, and the consequent destruction of the plaintiff's property, were caused by any of defendant's locomotives. The question has often been considered by the courts in this country and in England, and such evidence has, we think, been generally held admissible, as tending to prove the possibility and the consequent probability that some locomotive caused the fire, and as tending to show a negligent habit of the officers and agents of the railroad company"; citing *Piggot v. Eastern R. R. Co.*, 3 Man. G. & S. 229; *Sheldon v. Hudson River R. R. Co.*, 14 N. Y. 218; 67 Am. Dec. 155; *Field v. New York Cent. R. R. Co.*, 32 N. Y. 339; *Webb v. Rome etc. R. R. Co.*, 49 N. Y. 420; 10 Am. Rep. 389; *Cleveland v. Grand Trunk R. R. Co.*, 42 Vt. 449; *Illinois Cent. R. R. Co. v. McClelland*, 42 Ill. 358; *Smith v. Old Colony etc. R. R. Co.*, 10 R. I. 22; *Lombaugh v. Virginia City etc. R. R. Co.*, 9 Nev. 271.

In *Sheldon v. Hudson River R. R. Co.*, 14 N. Y. 218; 67 Am. Dec. 155, the plaintiff gave evidence which tended to show that the engines used by the defendant lacked some apparatus which was in use upon some other locomotive-engines, and which rendered the latter less liable to communicate fire to substances at the side of the road than those which were without that apparatus; that shortly before the fire, sparks and fire had been thrown from the engines used by the defendant in running its trains through the witness's premises, a greater distance than this building stood from the track of the railroad; and that he had picked up from the track, after the passage of trains, lighted coals

more than two inches in length. It was argued by the defendant's counsel that the evidence was too remote and indefinite; that it did not refer to any particular engine, etc. Chief Justice Denio, in delivering the opinion of the court, said: "This argument is not without force, but at the same time I think it is met by the peculiar circumstances of this case. These engines run night and day, and with such speed that no particular note can be taken of them as they pass. Moreover, there is such a general resemblance among them that a stranger to the business cannot readily distinguish one from another. It will therefore generally happen that when the property of a person is set on fire by an engine, the owner, though he may be perfectly satisfied that it was caused by an engine, and may be able to show facts sufficient, legitimately, to establish it, yet he may be utterly ignorant what particular engine did the mischief. It would be practically quite impossible, by any inquiries, to find out the offending engine, for a large proportion of those owned by the company are constantly in rapid motion. The business of running the trains on a railroad supposes a unity of management, and a general similarity in the fashion of the engines and the character of operation. I think, therefore, it is competent *prima facie* evidence for a person, seeking to establish the responsibility of the company for a burning upon the track of the road, after refuting every other probable cause of the fire, to show that about the time when it happened, the trains which the company was running past the location of the fire were so managed in respect to the furnaces as to be likely to set on fire objects not more remote than the property burned. It is presumed to be in the power of the company, which is intimately related with all its engineers and conductors, to controvert the fact sworn to if it is untrue, or if true in a particular instance, that it was not so in respect to the engines which passed the place at a particular time before the occurrence of the fire. The effect of the evidence would only be to shift the *onus probandi* upon the company, and that, under the circumstances of this case, seems to me to be unavoidable."

We may also refer to the case of *Koonts v. Oregon R'y & Nav. Co.*, 20 Or. 3, which was an action to recover damages for the destruction of plaintiff's mill by fire falling from one of defendant's locomotives. What particular engine this was the evidence did not disclose, nor was the plaintiff able to ascertain or make proof of its identification from other engines

of the company; but to strengthen the inference that the burning of the mill originated in sparks from this engine, and to show habitual negligence of the officers and agents of the railroad company, he introduced evidence to show that other engines, of like appearance and construction, frequently scattered fire in large quantities, and set other fires along the track, prior and subsequent to the burning complained of. Mr. Justice Lord, in delivering the opinion of the court, said: "On account of this difficulty of identifying a passing engine, especially at night-time, so as to make direct proof of such negligence, and also for the reason, as stated by Mr. Thompson, that the business of running railroad trains supposes a unity of management, and a general similarity in the construction of engines, the admission of evidence as to other and distinct fires from the one alleged to have caused the injury is permitted. Nor is it requisite that the testimony must also show that the engine which it is claimed caused the fire was one of those which had previously or subsequently scattered fire along defendant's track, but it is enough, as was shown, that it is similar in appearance and construction, and under the same general management. Hence it is quite generally held that evidence that sparks were frequently ejected from passing engines, causing fire along its track, on other occasions, is relevant and competent to show habitual negligence, and to strengthen and sustain the inference that the fire originated from the cause alleged. As the plaintiff must proceed with his evidence in the first instance, the fact that the defendant may be able to prove the identity of the engine cannot have the effect to make the admission of such evidence error."

In *Field v. New York Cent. R. R. Co.*, 32 N. Y. 339, the court, in speaking of this quality of evidence, says: "At all events, it showed that a practice was indulged in on the part of the company, about the time and near the place, which would have injured the plaintiff's property, rendering it probable, to a certain degree, that the injury was attributable to that cause."

We have quoted extensively from these authorities to show that the rule of evidence referred to, although, perhaps, comparatively new in its application in Pennsylvania, is the rule generally recognized in this country, not only by the text-writers, but by the courts. It may therefore be considered as settled, in cases of this kind, where the offending engine is not clearly or satisfactorily identified, that it is competent for the

plaintiff to prove that the defendant's locomotives generally, or many of them, at or about the time of the occurrence, threw sparks of unusual size, and kindled numerous fires upon that part of their road, to sustain or strengthen the inference that the fire originated from the cause alleged. And as in the case at bar it is not definitely ascertained to which of the four engines this fire was attributable, three of them being unknown and unidentified, we cannot see how testimony of this character could be excluded.

But the objective point of the inquiry is the condition of the passing engines at the time of the occurrence. It is a matter of little consequence what may have been their condition ten years or two years before that; for the precautions against fire, and the management of the engines, may have been greatly changed within that period. It does not follow, because the company, in its official management, may have been negligent in this respect at a time so remote, that it still remains so. The habits of individuals may, in some sense, be spoken of as fixed habits; but the official control and management of the affairs of a railroad company, as well as the various devices used as precautions against danger, are liable to frequent and radical changes. The line must be drawn somewhere. This class of testimony is exceptional in character at the best, and is only admissible because the ordinary sources of proof are inaccessible, and direct evidence impracticable. The rule should not, therefore, be carried beyond the necessity which justifies its admission. If at or about the time when fires are alleged to have been set by locomotive engines, unknown by number or other means of identification, the company is shown to have been habitually negligent in the equipment or management of its engines, or of many of them, this is a circumstance to be considered in connection with others, not only in determining the origin of the fire, but in deciding whether or not the company was, at the time, in this as in many other instances, negligent in failing to provide suitable precautions against danger. If many of the company's engines, at or about the time, are without sufficient spark-arresters, and frequent fires are kindled in consequence, it may well be inferred, in view of the effectual character of mechanical inventions of this kind, not only that the fire in question originated from this cause, but that it occurred from the habitual negligence of the company in failing to provide sufficient spark-arresters.



Reasonable latitude must, of course, be allowed. The purpose of such proofs would be defeated if they were confined to the exact or precise time of the occurrence. In *Stranahan's* case, the court admitted proof of the extent to which the various locomotives of the company threw sparks on or about the 9th (6th) of November, 1867, when the fire occurred. In *Gowen v. Glaser*, Penn. Sup. Ct., April 12, 1886, 8 Cent. Rep. 109, the inquiry was as to sparks thrown and fires set very shortly before and very shortly after the occurrence. In *Sheldon v. Hudson River R. R. Co.*, 14 N. Y. 218, 67 Am. Dec. 155, the inquiry was restricted to matters occurring about the time and near the place of the fire. In *Koontz v. Oregon R'y & Nav. Co.*, 20 Or. 3, the offer was somewhat more extended in its effects, but we are of opinion that the rule should not be given greater latitude than we have given it.

In the case at bar, the first offer received, and which is the ground of the first specification of error, was as follows: "Plaintiffs offer to prove that the property of persons along the line of defendant's road, which passed the property of the plaintiffs destroyed by the fire in question on August 10, 1883, and within twelve miles of plaintiffs' said property, was repeatedly set on fire by unknown and unidentified engines of the defendant, and that the sparks causing said fires, emitted by the said engines, exceeded a hickory nut in size, to be accompanied by evidence of experts showing that engines throwing sparks of the size of hickory nuts either did not use the most approved spark-arresters in general use, or if they did, the spark-arresters used were permitted to become defective and out of repair, or were negligently managed by those in charge of them." This offer, it will be seen, was wholly without limit as to time. The testimony received under it was, in some instances, confined to two or three months, in some to six months, and in some the testimony was general, and in such form as not to indicate to what period of time it referred. The second offer was, "to prove that many of the locomotive engines of the defendant, which they cannot identify and which passed the plaintiff's mill frequently during a period of six months preceding the fire, habitually threw sparks of the size of a hickory nut, or larger," etc. We are of opinion that the admission of these offers was error. The examination should be confined to the negligent operation of the engines of the company at or about the time of the fire, with such reasonable lat-



itude, before and after the occurrence, as is sufficient to enable such proofs to be practicable.

What has been said disposes of the first, second, and third assignments of error. The remaining assignments are without merit, and are dismissed.

The judgment is reversed, and a *venire facias de novo* awarded.

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**RAILROADS — LIABILITY OF, FOR FIRE FROM ESCAPE OF SPARKS — BURDEN OF PROOF.** — In order to recover for loss by fire from the escape of sparks from an engine equipped with the most effective appliances to prevent the escape of fire, the burden of proof is upon the plaintiff to clearly establish the negligence of the railroad company: *Meyer v. Vicksburg etc. R. R. Co.*, 41 La. Ann. 639; 17 Am. St. Rep. 408, and note. From the fact that a fire is started by sparks from the chimney of a locomotive, no presumption arises that the company owning the locomotive was negligent in its operation: *Bernard v. Richmond etc. R. R. Co.*, 85 Va. 792; 17 Am. St. Rep. 103 and note; note to *Laird v. Railroad*, 13 Am. St. Rep. 572, where the cases are collected.

**RAILROADS — LIABILITY FOR FIRE — SPARK-ARRESTERS — NEGLIGENCE.** — It is evidence of negligence for a railroad company to run an engine without an appliance on the smoke-stack to arrest sparks when fire is thereby communicated to adjoining property: *Bedell v. Long Island R. R. Co.*, 44 N. Y. 367; 4 Am. Rep. 688; *Steinway v. Erie R'y*, 43 N. Y. 123; 3 Am. Rep. 673; *Jackson v. Chicago etc. R'y Co.*, 31 Iowa, 176; 7 Am. Rep. 120, and note. *Lackawanna etc. R. R. Co. v. Doak*, 52 Pa. St. 379; 91 Am. Dec. 166, and note. Proof that a fire originated from sparks emitted from a locomotive raises a presumption of negligence consisting in a defect in the construction of the locomotive, or want of care in its management, and casts upon the company the burden of rebutting it: *Louisville etc. R. R. Co. v. Reese*, 85 Ala. 497; 7 Am. St. Rep. 66, and note.

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## WEIGLEY v. COFFMAN.

[144 PENNSYLVANIA STATE, 489.]

**PARTNERSHIP — SETTLEMENT OF ACCOUNT — JURISDICTION.** — The court of common pleas has exclusive jurisdiction to entertain a bill for the settlement of a partnership account after the death of one of the partners.

**JUDGMENTS IN EQUITY — RES JUDICATA — DISMISSAL OF BILL.** — A final decree in equity dismissing a bill upon its merits, without a stipulation against prejudice, is a bar to another bill between the same parties upon the same matter in another court. Such order of dismissal is a bar only when the court has determined that the plaintiff has no title to the relief sought by his bill.

**RES JUDICATA — DISMISSAL OF BILL — JURISDICTION.** — Where a bill in equity is dismissed for want of jurisdiction, the dismissal is not upon the merits, and is not a bar to another action between the same parties for the same cause, although the action of the court in dismissing the bill was erroneous.

*John H. Colton and Samuel G. Perkins, for the appellant.*

*Amos Briggs and A. M. Beitler, for the appellee.*

CLARK, J. This bill is for an account of the firm of C. B. and G. A. Miller. The partnership was formed in November 1878, and continued until the decease of Charles B. Miller, who died November 13, 1884. Grace M. Coffman is the surviving executrix of his last will and testament. G. A. Miller, the surviving partner, died January 12, 1888, and letters testamentary on his will were issued to W. W. Weigley.

No settlement of the partnership affairs was had in the lifetime of Charles B. Miller. After his death, however, George A. Miller, the surviving partner, filed his bill for an account in the court of common pleas No. 3, of Philadelphia, setting forth that at the death of said Charles B. Miller the clear profits amounted to a sum not less than \$35,000, which should be equally divided, and that the said Charles B. Miller at his decease had in his hands the sum of \$16,000.61, which was due and owing to him; that no settlement had yet been made; and therefore praying for an account. To this bill the defendant demurred, filing *inter alia* the following grounds of demurrer: 1. The defendant is but a trustee, and has no interest in the *corpus* of the estate; 3. As surviving partner of the alleged copartnership of C. B. and G. A. Miller, it is the plaintiff's duty to convert the copartnership assets into money, to pay all the debts of the copartnership, to account to the representatives of the estate of the deceased partner, and to show that he is a creditor partner of said firm, before any procedure calling on the testator's estate to make answer to his alleged claim; 4. The said bill does not allege or show that the assets of said copartnership will not pay the debts thereof, and also what may be due, if anything, to the plaintiff. At the hearing, the president judge, Ludlow, said: "The bill does not show that an account of the partnership business has been stated by the plaintiff. It is his duty, as surviving partner, to settle the business, and to account to the estate of his deceased partner. If it is found that there is a balance due to himself, the orphans' court has jurisdiction to allow his claim out of the estate of the decedent." The court was of opinion that the bill was fatally defective, and the demurrer was sustained, and the bill dismissed without prejudice.

The surviving partner, as he alleges, thereupon settled up the outstanding accounts, and prepared a statement of the

affairs of the firm, which exhibited an indebtedness to him of \$16,000.61 by the estate of Charles B. Miller, deceased. This claim he presented to the executrix of the estate of Charles B. Miller, deceased, who refused to pay the same. He then, on the 8th of January, 1886, filed in the common pleas No. 1, of Philadelphia, a second bill for an account, to which the defendant again demurred, and as cause for demurrer assigned the want of jurisdiction in the common pleas to give the relief prayed for. On the 19th of June, 1886, the court, being of opinion that the jurisdiction was exclusively in the orphans' court, sustained the demurrer, and dismissed the bill, with costs.

The executrix of Charles B. Miller, deceased, having filed her account on the 28th of December, 1885, George A. Miller accordingly went into the orphans' court, when it was called for audit, and presented his claim for \$16,000.61, alleged to be due him as surviving partner, on his own statement of the partnership accounts. The orphans' court in like manner declined jurisdiction, for the reason that the claim involved the settlement of a partnership account, and that ordinarily the authority of the orphans' court did not extend to the settlement of accounts between partners. Pending the proceedings in the orphans' court, George A. Miller died. The decree of the orphans' court, having been brought into this court upon an appeal, was affirmed: *Miller's Estate*, 186 Pa. St. 349. Our brother Mitchell, delivering the opinion of the court, said: "Has the orphans' court jurisdiction of such an issue? To state the question thus clear of irrelevant matters seems to answer it in the negative. It is not claimed that an account was stated by the assumed partners in the lifetime of both, and a balance found due to the appellant, upon which he would have standing as a creditor to maintain *assumpsit*, or to come in as a claimant upon the fund. His standing as a creditor at all, in which character alone can he make his claim, depends on the establishment of the disputed facts of the existence of a partnership, and the balance due him as a creditor partner upon the account. These facts the orphans' court has no jurisdiction to determine, nor would it have any means of enforcing payment by appellant should the account when stated show a balance against him. Such issues belong to the common pleas, either in an action of account, or in the more convenient form of a bill in equity, where the chancellor has control over both parties, to enforce performance whichever

way the result may turn out. *Wiley's Appeal*, 84 Pa. St. 270, and *Ainey's Appeal*, 11 Week. Not. Cas. 568, 2 Penny. 192, were cited in support of this doctrine.

Pending an appeal from the orphans' court, the appellant in this case filed the bill now under consideration, to which the appellee pleaded *res judicata*, setting up the dismissal of the bill in the common pleas No. 1 as a bar to the present bill. To this the appellant replied that the bill filed in common pleas No. 1 was dismissed solely for want of jurisdiction in the said court, and not upon the merits. As the cause is here for argument upon the bill, answer, and replication, the facts set forth in the replication must be assumed; and that the fact thus assumed is true, appears from the action of the court upon the motion to amend: *Weigley v. Coffman*, 23 Week. Not. Cas. 27.

The final decree of a court of chancery, dismissing a bill upon its merits without a stipulation against prejudice, is, of course, conclusive between the same parties upon the same matter coming in question in another court: *Kelsey v. Murphy*, 26 Pa. St. 78; *Westcott v. Edmunds*, 68 Pa. St. 34; *Daniell's Chancery Practice*, 659, 994, note, and cases cited. Every court has the power, in the first instance, to determine its own jurisdiction; the first point decided by a court in any case, although it may not be in terms, is that of jurisdiction; and it has that power, although its decision and the law may be that it really has no such jurisdiction: *King v. Poole*, 36 Barb. 242; 12 Am. & Eng. Ency. of Law, 307, and cases cited.

Judgment upon a point not touching the merits of the principal matter in dispute will, in respect of that point, ordinarily raise an estoppel. "The parties and their privies will be precluded from asserting the contrary of the fact found in such judgment. Thus dismissal of a suit for want of jurisdiction will estop the plaintiff from alleging, after the expiration of the statute of limitations, that he had begun suit (no other one having been undertaken) within the proper time; and indeed, it appears to be true, as a general proposition, that where a party succeeded in defeating an action by his pleading, by motion, or the like, he cannot defeat a second action by taking a position inconsistent with that taken in the first": *Bigelow on Estoppel*, 53. At the hearing of the bill in common pleas No. 1, the appellee demurred, assigning want of jurisdiction in the court. She now contends, and seeks to dismiss the plaintiff's bill, upon the plea of *res judicata*, upon the alleged

ground that the court had jurisdiction. This is an inconsistency which cannot be allowed. It is a matter of no consequence in this case that the court of common pleas No. 1 in fact had jurisdiction; that court decided otherwise, and refused to exercise its jurisdiction. It is true that an appeal might have been taken, but none was taken, and the decision against the jurisdiction in consequence became the law in that particular case; but as the decision was not upon the merits, and did not determine the plaintiff's title to relief under the bill, it was not, according to all the cases, a bar in another suit.

The determination of the question of jurisdiction is but preliminary to the consideration of the case on its merits. A decree, to be conclusive in other cases between the same parties, must have been on the merits of the case: Freeman on Judgments, 3d ed., secs. 260-266. The judgment must be upon the merits; if the real merits of the action are not decided in the prior judgment, it is no bar: Herman on Estoppel, 278, and cases there cited. "It is only where the point in issue has been determined that a judgment is a bar. If the suit is discontinued, or the plaintiff becomes nonsuit, or for any other cause there has been no judgment of the court upon the matter in issue, the proceedings are not conclusive. So, also, in order to constitute the former judgment a complete bar, it must appear to have been a decision upon the merits, and this will be sufficient though the declaration were essentially defective, so that it would have been adjudged bad on demurrer. But if the trial went off on a technical defect, or because the debt was not yet due, or because the court had not jurisdiction, or because of temporary disability of the plaintiff to sue, or the like, the judgment will be no bar to future action": Greenl. Ev., secs. 529, 530. "If the decision was rendered upon a mere motion or a summary application, or if the cause was dismissed upon some preliminary ground, as upon a plea in abatement,—e. g., because the wrong forum or mode of suit had been resorted to, for want of jurisdiction, defect in the pleadings, misjoinder, non-joinder, non-appearance of the plaintiff, or the like,—the parties are at liberty to raise the main issue again in any other form they choose": Bigelow on Estoppel, 52. An order of dismissal is a bar only when the court has determined that the plaintiff has no title to the relief sought by his bill: Story's Eq. Pl., sec. 793. "The doctrine of *res judicata*," said Mr. Justice Foster, in *Foster v. The Richard Busteed*, 100 Mass. 409, 1 Am. Rep. 125, "is plain and intelligible, and

amounts simply to this: That a cause of action once finally determined without appeal between the parties, on the merits, by any competent tribunal, cannot afterwards be litigated by new proceedings, either before the same or any other tribunal. But no such effect is attributable to a decree dismissing a bill for want of jurisdiction, failure of prosecution, want of parties, or any other cause not involving the essential merits of the controversy; and where in the answer various matters of defense are set forth, some of which only relate to the maintenance of the suit and others to the merits, and there is a general decree of bill dismissed, from which it does not appear what was the prevailing ground of defense, it is impossible to hold that the decree operates to preclude future proceedings." In *Walden v. Bodley*, 14 Pet. 156, it was held that a decree dismissing a bill in chancery generally may be set up in bar of a second bill; but where the bill has been dismissed on the ground that the court had no jurisdiction, which shows that the merits were not heard, the dismissal is not a bar to a second bill. To the same effect, also, is *Hughes v. United States*, 4 Wall. 232. From the authorities cited, and the reasons assigned therein, it is plain that when a bill is dismissed upon the ground of want of jurisdiction, the dismissal cannot be said to be upon the merits; for whether the action of the court be right or wrong, the complainant's title to the relief sought is not thereby determined.

The decree of the common pleas is reversed, at the costs of the appellees, and the record is remitted for further proceedings.

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**PARTNERSHIP — ACCOUNTING — JURISDICTION OF EQUITY.** — A court of equity will not entertain a bill for an accounting between partners, when the transaction does not involve a statement of complicated accounts, and has no feature taking it out of the jurisdiction of a court of law: *Lesley v. Rosson*, 39 Miss. 368; 77 Am. Dec. 672, and note. See *Bell v. Hudson*, 73 Cal. 285; 2 Am. St. Rep. 791.

**JUDGMENT OF DISMISSAL AS RES JUDICATA.** — An action aided by attachment may be maintained in Iowa against a foreign corporation having property within the state; and a dismissal by a federal court in that state of a former action for the same cause unaided by attachment, on the ground that jurisdiction of the defendant had not been acquired, is no bar to a subsequent action in the state court commenced by attachment: *Weyand v. Atchison etc. Ry Co.*, 75 Iowa, 573; 9 Am. St. Rep. 504, and note. After trial and verdict for plaintiff, set aside on motion of the defendant, the plaintiff has the same right to dismiss as if no trial had been had. And after such dismissal he may bring another action for the same cause of action: *Phelps v. Winona etc. R. R. Co.*, 37 Minn. 485; 5 Am. St. Rep. 867. A judgment, to be a bar, must have been upon the merits: *Pepper v. Donnelly*, 87 Ky. 250.

**GALLAGHER v. KEMMERER.**

[144 PENNSYLVANIA STATE, 509.]

**NUISANCE — INDEPENDENT TRESPASSERS — LIABILITY OF EACH.** — Where an injury to lands from the accumulation of refuse from coal works is the result of independent acts of trespass by two or more persons, each act is a separate cause of action for that portion of the injury done by it, although the exact damage may be difficult of ascertainment. Such independent acts do not constitute the several actors joint trespassers because the general consequences become united, nor will a release granted to one of them relieve the others from their liability for a proportionate amount of the damages caused by the independent act of each of them.

**WITNESS — COMPETENCY — VALUE OF LAND.** — A witness called to testify as to damages to land, who is without definite knowledge as to its market value both before and after the injury complained of, is incompetent to testify as to the extent to which its market value has been affected, or as to the amount of damage it has sustained.

*G. L. Halsey and H. W. Palmer, for the appellants.*

*Edward A. Lynch and John Lynch, for the appellee.*

**CLARK, J.** This action of trespass on the case was brought by Bernard Gallagher to recover damages for injuries to his land from a deposit of mine-water, culm, and dirt, accumulated thereon from the defendants' mining operations on Sandy Run Creek, in Luzerne County. The creek has its source in the mountains, about four or five miles above Gallagher's land, through which it passes. The defendants' operations were commenced in the year 1877. The plaintiff alleges that in the process of washing their coal, the refuse, culm, and dirt were conducted in chutes, which emptied the dirt into the creek, and by the waters of the creek were carried to and thrown upon his meadow-land, covering twenty acres or more, and rendering the land barren and wholly unproductive. It appears, however, that the Highland Coal Company, operated by Markle & Co., had been mining coal several miles above on the same stream from 1864, and that that company has ever since been so engaged continuously to the bringing of this suit. The plaintiff alleges that the culm and dirt from both these mines could, at a moderate and reasonable expense, have been banked, and if this had been done no appreciable injury would have resulted; and further, that the Highland Coal Company, to some extent at least, pursued this plan, but the defendant company dumped the refuse of their mines directly into the stream. In August, 1884, Bernard Gallagher, in consideration of the sum of four hundred dollars, by formal writing under



seal released the Highland Coal Company from all claims and demands for damages, and from compensation for injuries then or thereafter done to his property, either from the pollution of the stream, or from the deposit of refuse matter upon his lands by that company. It may be fairly inferred from this that the Highland Coal Company did, in some degree, contribute to the injuries of which the plaintiff complains.

At the trial, the defendant presented a point for instruction to the jury, as follows: "That as it appears from the evidence that the plaintiff settled with Markle & Co. for damages sustained by him for the fouling of Sandy Run and the deposit of culm on his land by them, and it being impossible, under the evidence, to separate and ascertain the proportion of damage caused by them and by the defendants, it having been occasioned by simultaneous and contemporaneous acts, the settlement must be regarded as an accord and satisfaction for the whole damage, and the plaintiff cannot recover in this action."

This point was negatived, and that is the first error assigned.

It is argued, on the part of the appellants, that the injury to which the plaintiff was subjected was of such a character that it could not, as between the parties who caused it, be divided, so as to determine in what proportion it was caused by each; and that even if the defendants' mines had not been operated, the mining operations of the Highland Coal Company would have resulted in the same injury. It is true that the injury complained of may have been caused in part by the operations of the Highland Coal Company, conducted contemporaneously with the operations of the defendants' mines, and that it would be difficult, if not quite impossible, to separate and ascertain, definitely or certainly, the proportion of the whole damage done by each of these operations respectively. But these several operations were entirely independent of each other. They were several miles apart, and the ownership, management, and control were wholly distinct and separate. There was no concert of action or common purpose or design which would support the theory of joint injury. The case, in this branch, is ruled by *Little Schuylkill etc. Co. v. Richards*, 57 Pa. St. 142; 98 Am. Dec. 209. In that case, the mill-dam was filled by deposits of coal dirt from different mines. The court below charged the jury that if, at the time the defendants were throwing dirt into the river, the same thing was being done by other collieries, and the defendants

knew it, they were liable for the combined result. This instruction was held to be erroneous. The ground of action, it was there said, is not the deposit of the dirt in the dam, but the negligent act above. The defendants' liability, therefore, began with the act on their own land, and they were responsible for the consequences; and as the negligent act was separate and independent of the acts of the other miners, it was several when committed, and did not become joint, because the general consequences were united. "Without concert of action," said this court in the case cited, "no joint suit could be brought against the owners of all the collieries, and clearly this must be the test; for if the defendants can be held liable for the acts of all the others, so each and every other owner can be made liable for all the rest, and the action must be joint and several. But the moment we should find them jointly sued, then the want of concert and the several liability of each would be apparent. These principles are fully sustained by the following cases: *Russell v. Tomlinson*, 2 Conn. 206; *Adams v. Hall*, 2 Vt. 9; 19 Am. Dec. 690; *Van Steenburgh v. Tobias*, 17 Wend. 562; 81 Am. Dec. 810; *Buddington v. Shearer*, 20 Pick. 477; *Auchmuty v. Ham*, 1 Denio, 495; *Partenheimer v. Van Order*, 20 Barb. 479." Unless the negligence of two persons is joint and concurrent, each is liable for his own negligence only: *Boyd v. Insurance Patrol*, 118 Pa. St. 269. To the same effect are the cases of *Seely v. Alden*, 61 Pa. St. 306; *Leidig v. Bucher*, 74 Pa. St. 67; and *Little Schuylkill Co. v. French*, 81½ Pa. St. 366. It is a matter of no consequence whatever that the stream was not a public highway; that fact could not in any way affect the principle referred to; and if the Highland Coal Company was not a joint tort-feasor, it is immaterial in what form the release was effected, whether by deed or otherwise.

In *Pittsburgh etc. R'y Co. v. Vance*, 115 Pa. St. 332, we said: "In order that a witness may be competent to testify intelligently as to the market value of land, he should have some special opportunity for observation. He should, in a general way and to a reasonable extent, have in his mind the data from which the proper estimate of value ought to be made. If interrogated, he should be able to disclose sufficient actual knowledge of the subject to indicate that he is in a condition to know what he proposes to state, and to enable the jury to judge of the probable, approximate accuracy of his conclusions." To this effect, also, is *Curtin v. Nittany Val. R. R. Co.*,

135 Pa. St. 20. Michael Campbell, a witness produced by the plaintiff, said that he was twenty-six years of age; that he had lived in the neighborhood twelve or thirteen years, and was driving a milk-wagon for his father; he was therefore but thirteen years of age when the defendants commenced operations. The plaintiff proposed to prove by this witness the market value of the land free from this deposit of coal dirt, and the market value as affected by it. This necessarily implied a knowledge, on the part of the witness, of the nature and condition of the land before the deposit was made; but he testified to nothing which justified the admission of his testimony on this point. As to his knowledge of its previous condition, he testified, on cross-examination, as follows:—

“Q. How old are you? A. Twenty-six. Q. You say that the stream has been bad longer than you can remember? A. Well, no; not so long that I can't remember it; good while ago, when I was a small boy. I never took any notice of it. Of course, I know cattle used to drink it at that time. Q. Did you ever see Gallagher's land before it was covered with coal dirt? A. I have seen it: yes, sir; but I have not been through it. I saw it. Q. That is, when you were a boy? A. Yes, sir; I worked for Mr. Heinsen. Q. That creek-bottom a long there was a swampy piece of ground,—wet piece of ground? A. I could not speak for Mr. Gallagher's, but Mr. Heinsen's I passed with horses on the opposite side of the creek. Q. The land above the bottom is all dry land, and there is where the land has been cleared and cultivated; there was no part of Gallagher's land cleared before the coal dirt was put on? A. Not that I know of. Q. Was it a laurel swamp, as described by Mr. Benner, the surveyor? A. That I could not say. Q. Your father's place is somewhere about two miles below Gallagher's? A. Two miles, or a mile and a half, down along the Wetherly road. Q. You live with your father? A. Yes, sir.”

The witness might, perhaps, have been competent to testify as to the value of the land after the injury, but it is plain by his own statement that he knew nothing of its nature and character before the injury. He did not pretend to know whether it was dry land, or merely a laurel swamp. How was it possible, therefore, for him to testify as to the value of the land free from the injury complained of?

The judgment is reversed, and a *venire facias de novo* awarded.

**JOINT LIABILITY. — TORT-FEASORS ARE NOT LIABLE JOINTLY** for damages resulting from their wrongful acts when they act separately and when they maintain different ditches whereby waters are turned into a cañon and flow over plaintiff's land and cover it with *débris*: *Miller v. Highland Ditch Co.*, 87 Cal. 430; 22 Am. St. Rep. 254, and note. In actions for trespass brought for separate acts done by two or more persons, if there was no concert of action, no common intent, there can be no joint liability: *Klander v. McGrath*, 35 Pa. St. 128; 78 Am. Dec. 329, and note. A dismissal of an action against one of several co-trespassers jointly sued cannot be pleaded in bar by the others: *Bloss v. Phymale*, 3 W. Va. 393; 100 Am. Dec. 752. See extended note to *Kirkwood v. Miller*, 73 Am. Dec. 137, discussing the liability of co-trespassers.

**WITNESSES — EXPERTS — VALUE OF REALTY. —**The knowledge of the market value of property is a fact known from information, and is not a bare matter of opinion: *Missouri etc. R. R. Co. v. Fagan*, 72 Tex. 127; 13 Am. St. Rep. 776. The opinion of a witness as to the value of land may be excluded, where the only evidence of his qualification to express an opinion is his statement that he knew the value of the land and was competent to state it: *Flint v. Flint*, 6 Allen, 34; 83 Am. Dec. 615. The opinions of witnesses as to the value of land, who never saw the land until years after the right to compensation has accrued, are not admissible: *San Diego Land Co. v. Neale*, 88 Cal. 50.

## COMMONWEALTH v. CENTRAL DISTRICT AND PRINT- ING TELEGRAPH COMPANY.

[145 PENNSYLVANIA STATE, 121.]

**PATENT RIGHT — TITLE ACQUIRED BY LESSEE. —**A patent right is an incorporeal right protected by letters patent to use an appliance discovered by the patentee for the production of a certain result. Such right is clearly distinguishable from the patented appliance, and the lessee of such appliance, without more, does not acquire any title to or ownership in the patent under which it was made.

**TAXATION — PATENT RIGHTS — LESSEE OF PATENTED APPLIANCE. —**The capital stock of a telephone company, issued by it in consideration of its exclusive right, as lessee, to use patented telephone appliances within a certain territory, the patentee retaining the exclusive ownership of the patent and absolute control over the manufacture of the leased appliances, is not an investment in patent rights by the lessee, and such stock is therefore subject to taxation by the state.

*W. U. Hensel, attorney-general, and James A. Stranahan, deputy attorney-general, for the commonwealth, appellant.*

*M. E. Olmsted, for the appellee.*

**WILLIAMS, J.** This case was tried without a jury, and the facts appear fully in the findings of the learned trial judge. From these we learn that the American Bell Telephone Company is a Massachusetts corporation, owning the patents un-

der which the instruments for transmitting or reproducing sound are made, and controlling absolutely the manufacture and use of them. It does not sell any interest in the patent, or any territory, or even a single instrument made by it; but by leasing the instruments for a term of years at a rental, it maintains its exclusive ownership and control over this mode of communicating messages, and levies such exactions upon the public as it pleases. Having no office and doing no business in this state, it escapes taxation altogether: *Commonwealth v. American Bell Tel. Co.*, 129 Pa. St. 217. The mode of doing business in this state is by the organization of subordinate companies, which erect the poles, put the wires upon them, build or rent offices and exchanges, and fit them out with all the appliances necessary, except the instruments manufactured by the Massachusetts company. These are leased, to be used only within a certain district, and by the subordinate company or its customers. The appellee, the Central District and Printing Telegraph Company, is one of these subordinate companies. It is doing business in this state, under the authority of a charter granted here. Its business is the transmission of messages over its lines. It owns the entire plant used in its business, or has an exclusive control of it under a lease, and its system covers about fifty contiguous counties in Pennsylvania, West Virginia, and Ohio. The instruments used by customers and at the several offices or exchanges are the property of the Massachusetts company. The appellee has no ownership in them. It cannot make them. It cannot sell them. It cannot use them outside the enumerated counties. It cannot so much as control the price that shall be charged for the use of them by their customers. The state has levied a tax upon the capital stock of the appellee. This was originally five hundred thousand dollars, but the contract with the Massachusetts company required it to issue, at the end of ten years, a quarter of a million of dollars of additional stock, and deliver the same to that company. This has been done. The contention of the appellee, which was sustained in the court below, is, that the stock issued in pursuance of the contract to the Massachusetts company is not liable to this tax, because it is invested in patent rights.

Our first question is, What is a patent right? We reply, negatively, that it is not the article or machine made under the letters patent. That is the property of the maker, in the same way and with the same attributes that any other article

made or grown by him is his property. The only difference is, that while unpatented articles made by him may be imitated by others, this may not be, so long as the letters patent are in force, without his license or consent. The article so made is the fruit of the combination or appliance that has been patented, but is not the patent right. It will be best to adopt in this connection the exact words of the supreme court of the United States in *Patterson v. Kentucky*, 97 U. S. 501: "The right of property in the physical substance which is the fruit of the discovery is altogether distinct from the right in the discovery itself; just as the property in the instruments or plate by which copies of a map are multiplied is distinct from the copyright of the map itself." In support of this proposition, the case of *Stephens v. Cady*, 14 How. 528, was cited. Answering affirmatively, I would say that a patent right is the right, protected by letters patent, to use the process, combination, or appliance, discovered by the patentee, for the production of a certain result. It is an incorporeal right, conferred by the government, by way of encouragement to, and as compensation for, the employment of time and labor and money in the discovery of new and useful things to minister to the comfort and aid in the progress of the public. So long as the given result can be reached only by means of the process, combination, or appliance covered by the letters patent, the patentee has an exclusive control of the result. When some other inventor reaches the same result by another and better process discovered by him, he is not interfered with by the letters patent to his predecessor, so long as he does not infringe upon the invention they cover, but may, by the use of his own superior methods, supersede it and drive it from the market. An inventor, by an ingenious combination of wheels, levers, knives, and bars, produces a mowing-machine, and obtains a patent therefor. This does not interfere with the cutting of grass or grain in any other way, nor with the use of mowing-machines that do not employ the peculiar process, combination, or appliance covered by the patent. The patent, therefore, gives to the inventor no control over the result, the cutting of grass or grain, except in so far as it is sought to be done by the use of his device. It gives him no control over the instruments by which the cutting is done, except they employ the particular process, combination, or appliance to which he, as the inventor, has the exclusive right. This right, which is his by discovery, and which has been protected by

the act of the government in forbidding others to employ it without his consent, is the "patent right."

Our next question is, whether the appellee has invested any portion of its stock in the patent rights under which the Bell telephone instruments are manufactured. This question is fully answered by the contract to which we have already referred. It will not be pretended that it acquired any interest in the letters patent as owner of a fractional part of the title conferred by them; nor as the owner of the right to make and vend in any given subdivision of the territory covered by them; nor yet, as owner of a single instrument, the fruit of the patent right owned by the Massachusetts company. It is, as to this part of the plant employed in its business, a lessee. It hires the manufactured instruments as a farmer might hire a mowing-machine, and acquires no more interest in the patent right held by its lessor than would the farmer. It is quite common for manufacturers to lease instruments made by them under protection of letters patent. Printing-presses, pianos, mill-gearing, portable saw-mills, and other articles are thus leased; but it has never been suggested that the lessees became thereby owners of or investors in the patent rights under which the articles in their possession were made. On the other hand, those articles remain the property of the lessors, who part with nothing but the possession, for which they are paid the agreed rent, or in default of such payment, they take the article from the lessee, and resume possession by virtue of their absolute ownership. It is not important to inquire whether the stock issued to the Massachusetts company was a bonus or a method of securing an additional rent, since it is not pretended the appellee received any consideration for it beyond that which appears in the contract, which was the right to use manufactured instruments as a lessee. This was therefore not an investment in the patent rights, but in manufactured instruments and appliances made under the protection of the patents. The first is an incorporeal right, which the owners refuse to sell, in whole or in part; the other is its corporeal embodiment in a manufactured article, prepared for market; or, in the language of the supreme court of the United States, its "fruit." The first is the right of the inventor to the "child of his brain"; the other is the personal property of the maker, wrought into shape for the market by his hands, and distinguished from other personal property only



in this, that the process of manufacture is protected by the letters patent.

But let us look at the practical operation of the rule laid down in the court below. We will suppose, for this purpose, that the corporation owning the rights secured by letters patent is a Pennsylvania corporation, and that its capital stock, to the amount of one million dollars, is invested in the patents. This would be exempt from taxation by the state, because invested in incorporeal rights secured by the grant of the government of the United States, and evidenced by letters patent. We will suppose, further, that our corporation, like the Massachusetts corporation in this case, retains an exclusive control over the manufacture of the instruments to which its patents relate, and produces them in great numbers. Within the state we will suppose, there are ten local companies like that now before us, with their wires, stations, and exchanges, ready to enter upon the business of transmitting messages by telephone, with a capital stock, like that of the Central, of seven hundred and fifty thousand dollars each. They apply to our corporation for several thousands of its manufactured instruments with which to complete their plants and enter upon their business, and are told that the instruments are not for sale, but can be had only at a rental amounting to several times their value, annually. They accordingly take upon lease the machines they need, and pay as in this case, in addition to an annual rental in cash, one third of their capital stock in a block, as a bonus, or as an additional rent. Our corporation now owns two million five hundred thousand dollars of the stock of the local companies, which represents the use or rent of its manufactured goods. If the stocks are also exempt, then, on an actual investment of one million dollars in patents, we have three million five hundred thousand dollars of stock exempt from taxation. The same rule, applied in the other states, might result in the exemption throughout the country of fifty million dollars or one hundred million dollars of stock from state taxation, on an actual investment in patents of but one million dollars.

The trouble with this rule is, that it overlooks the distinction between the incorporeal right secured by letters patent, and the tangible commodity or finished product which is its fruit. This finished product, or fruit of the right secured by letters patent, is merchandise, whether it takes the form of a

patent reaper, a power printing-press, a fountain-pen, a pencil-sharpener, or an instrument called a telephone. If the manufacturer sells his product, the right to use it is an implied term of the contract of sale. If he leases it the same is true. Whether he sells or leases, he deals, not in a patent right, but in manufactured goods. The buyer or lessee gets no right under the letters patent, except that which follows as a necessary incident from his purchase or hiring, viz., the right to use the article bought or hired, without other liability than that which his contract provides for. We are clearly of the opinion that the stock paid the Massachusetts company, under the contract by which the defendant company secured the telephonic instruments needed in its business, was not an investment in patent rights, but in instruments that enter into and form part of its plant, as truly as the poles, or wires, or switch boards used by it.

The judgment is therefore reversed, and judgment is now entered in favor of the commonwealth for the balance of the tax as adjusted by the taxing officers of the commonwealth, with interest and costs.

Balance of tax on capital stock . . . . .	\$875 00
Interest at twelve per cent . . . . .	
Attorney-general's commission . . . . .	
<b>Total . . . . .</b>	<hr/>

**PATENTS — EFFECT OF LICENSE TO USE.** — A license to use an invention which is restrained to individuals is not an abandonment of the invention: *McCoy v. Burr*, 6 Pa. St. 147; 47 Am. Dec. 441, and note; *Slusser's Appeal*, 58 Pa. St. 155; 98 Am. Dec. 248, and note.

**PATENTS — CONTROL OF, BY GOVERNMENT.** — The use of a patented article devoted to public use is subject to control by state legislation: *State v. Telephone Co.*, 38 Ohio St. 296; 38 Am. Rep. 583.

## COMMONWEALTH v. EDISON ELECTRIC LIGHT CO.

[145 PENNSYLVANIA STATE, 121.]

**TAXATION — CAPITAL STOCK OF CORPORATION.** — A corporation engaged in producing electricity and selling it for the generation of light, heat, or power, is not a manufacturing corporation, within the meaning of a statute exempting from taxation the capital stock of manufacturing corporations not engaged in the manufacture of liquors or of gas.

**PATENT RIGHT — TITLE ACQUIRED BY LESSEE.** — The exclusive right secured by letters patent to the inventor is an incorporeal right, clearly distinguishable from the ownership of the patented appliance, and the lessee of such appliance, without more, acquires no title to or ownership in the patent under which it was made.

**TAXATION — PATENT RIGHTS — STOCK OF CORPORATION.** — The capital stock of one corporation paid to another corporation as the consideration for the right to use a patented appliance for the production of electricity within a certain territory as lessee, the patentee retaining exclusive ownership of the patent and the exclusive right to manufacture and dispose of the patented appliance leased, is not an investment in patent rights, and such stock is therefore subject to taxation by the state.

*W. U. Hensel, attorney-general, and James A. Stranahan, deputy attorney-general, for the commonwealth, appellant.*

*M. E. Olmsted, Samuel B. Huey, and Robert Snodgrass, for the appellee.*

**WILLIAMS, J.** Two questions are raised in this case. The first is, whether the appellee is a manufacturing company. While it might well be so regarded, if the question were an open one, we have no doubt that it does not come within the class recognized by our acts of assembly relating to manufacturing companies; and the learned judge of the court below reached a correct conclusion upon this question, for reasons given in the opinion of this court just filed in the case of *Commonwealth v. Northern Light and Power Co.*, 145 Pa. St. 105.

The other question is, whether any portion of the capital stock of the Philadelphia company is invested in patent rights, and for that reason exempt from taxation. The court below was of the opinion that stock issued to the Edison Electric Light Company of New York, amounting to about forty-nine thousand dollars, out of a total capital of one hundred and forty thousand dollars, was invested in patent rights, and therefore exempt. This finding rests on the written agreement or license bearing date on the third day of February, 1887, and we are now to inquire whether the finding is sustained by the agreement. It contains a recital that the Edison Electric Light Company of New York is the owner of many patents obtained for

appliances used in the production of electricity by artificial means, its delivery to customers, and its utilization for purposes of light, heat, and power. It recites, further, the desire of the Philadelphia company to acquire an exclusive right to use such appliances in the city of Philadelphia. Then follows the grant of the desired exclusive right, but only as to the use of the appliances, and under certain conditions and limitations, which show plainly the purpose of the owners of the patents to maintain their exclusive ownership in them, and their absolute control over the manufacture of the appliances, and over the manufactured articles when finished. Among these conditions is one that limits the right of the licensee to the supply of its customers on the described circuit; another forbidding the use of the license for any other purposes than such as relate to light, heat, and power to propel stationary machinery; another declaring the license to be personal to the licensee, and forbidding any assignment or transfer of it. Still another reserves to the New York company the right to terminate the license on any default made, resume the exclusive ownership of the territory, and grant a new license to another party covering the same exclusive right in the same territory.

Under this agreement, the licensee secures the right to use the appliances made under the several patents held by the licensor, for a fixed price, to be paid in money, in its own stock, or in both; and it secures nothing more. The New York company, on the other hand, retains its exclusive ownership of all its patents, an absolute control over the manufacture of its appliances protected by the patents, and over the use and disposition of every one of the manufactured articles which its licensee uses. We have just held in *Commonwealth v. Central D. & P. Tel. Co.*, 145 Pa. St. 121, *ante*, p. 677, — following *Patterson v. Kentucky*, 97 U. S. 501, *Stephens v. Cady*, 14 How. 528, and *Webber v. Virginia*, 103 U. S. 344, — that the exclusive right secured to the inventor by letters patent is an incorporeal right, clearly distinguishable from the ownership of the instrument or appliance manufactured under and by virtue of that right; and that a lessee of the instrument or appliance acquires no title to or ownership in the patent under which it was made. In the language of Justice Field in *Webber v. Virginia*, 103 U. S. 344: "The right conferred by the patent laws of the United States on inventors, to sell their inventions and discoveries, does not take the tangible property in which the invention or discovery may be exhibited or carried into effect

from the operation of the tax and license laws of the state." Whether the "tangible property"—that is, the machines or appliances made and ready for use—is in the hands of the makers, of vendors, lessees, or licensees, can make no difference. Such property is not a patent right, but the visible, tangible fruit of the right secured by the patent, which passes to a purchaser or lessee in precisely the same way that any other manufactured articles pass from the maker to the buyer or lessee. It is not necessary to repeat what was said upon this subject in *Commonwealth v. Central D. & P. Tel. Co.*, 145 Pa. St. 121; *ante*, p. 677; but for reasons given in the opinion filed in that case, we reverse the judgment as to the taxability of the stock of the appellee used to pay the rent of, or price of the license to use, the manufactured appliances of the New York company in its business in Philadelphia.

Judgment is now entered in favor of the appellant, the commonwealth of Pennsylvania, for the sum of \$147, with interest and costs in addition to the judgment entered in the court below.

Tax on \$49,000, capital stock . . . . .	\$147 00
Interest at twelve per cent from November 6, 1888, to	
Attorney-general's commission . . . . .	

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**PATENT RIGHTS.** — The questions involved in this case are decided in *Commonwealth v. Central etc. Tel. Co.*, 145 Pa. St. 121; *ante*, p. 677, and note. See also *Commonwealth v. American B. Tel. Co.*, 129 Pa. St. 217, in which the power of the state to tax patent rights is discussed.

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## HORSTICK v. DUNKLE,

[145 PENNSYLVANIA STATE, 220.]

### HIGHWAYS — LIABILITY OF LAND-OWNER WHO ALTERS GRADE OF HIGHWAY.

— A land-owner, who, by permission of a turnpike company, alters the grade of a public highway on his land, assumes the duty and obligation of such company to make the altered road suitable and safe for public travel.

### HIGHWAYS — LIABILITY FOR INJURY CAUSED BY FRIGHTENED HORSE. —

Township officers or others whose duty it is to keep a public highway safe and suitable for travel are only bound to anticipate the ordinary needs of travel conducted in the ordinary manner, and they are not bound to anticipate the danger to which the frightened horse of a traveler may expose him.

### HIGHWAYS — LIABILITY OF LAND-OWNER FOR INJURY CAUSED BY FRIGHTENED HORSE ON HIGHWAY. —

An adjoining land-owner who maintains

an unfenced pond fifteen feet from the edge of a public highway and twenty-seven feet from the traveled part of the road, which is suitable for travel, is not liable to a traveler whose horse, becoming frightened from some unknown cause not attributable to the road or the pond, leaves the road and carries his owner into such pond, where he receives the injury complained of.

TRESPASS to recover for personal injuries alleged to have been caused by the negligence of defendants. A small stream running through defendants' land several feet below the level of the highway on which plaintiff was driving crossed it at the place where the accident occurred. Some time before the then owners of the adjoining land built a dam eight feet high across the stream on the northerly side, and about fifteen feet from the highway, for the purpose of collecting the water and forming an ice-pond. The defendants, after purchasing the land, obtained permission from the turnpike company building the road to raise the grade of the road at the point referred to, and they filled in about eight feet, turnpiked the surface, constructed a culvert for the passage of the stream, and thus raised the road and their own land between it and the dam to the level of the latter. They failed to rebuild a fence or guard-rail which had formerly existed between the road and the dam. While plaintiff was driving on the highway at the point above described, his horse suddenly frightened from some unknown cause, and ran into the ice-pond, severely injuring plaintiff. Other facts are stated in the opinion. Judgment for plaintiff, and defendants appealed.

*Edwin W. Jackson*, for the appellants.

*Robert Snodgrass*, for the appellee.

MITCHELL, J. The learned judge below laid down very clearly and accurately the general rules applicable to cases of accidents through alleged defects in the public roads, and the only substantial question before us is, whether, on the admitted or undisputed facts, there was sufficient evidence of negligence on the part of defendants to go to the jury.

The rule as to excavations or other sources of danger by an owner of land in the vicinity of a public road was stated in *Gramlich v. Wurst*, 86 Pa. St. 74, 27 Am. Rep. 684, and *Gillespie v. McGowan*, 100 Pa. St. 144, 45 Am. Rep. 865, and need not be enlarged upon here. On the admitted facts of this case, the defendants would not have been liable merely as owners of the pond. But defendants, having altered the road

by agreement or license from the turnpike company, through the receiver, assumed the duty of the company in that regard, and the case must be considered in the light of the duty of the company if it had made the change itself.

The precise limits of liability, where the element of an unruly or frightened horse enters into the causes of an accident on a public highway, have been the subject of controversy and some difficulty. It is conceded that our cases hold the township authorities to a more exacting rule than obtains in some other states, but none of them go so far as to say that they must make the road safe for runaway horses. The subject was carefully considered in the recent case of *Jackson Township v. Wagner*, 127 Pa. St. 184, 14 Am. St. Rep. 833, where our brother Williams said: "Township officers are bound to anticipate and provide against the ordinary needs of travel conducted in the ordinary manner, . . . but are not bound to anticipate the danger to which a broken wagon or a frightened horse may expose the driver." And again: "It is necessary to inquire whether the accident was the natural or probable result of any act or omission of the township officers, which rendered the highway unsafe for the purposes of travel, conducted in the ordinary manner and by the ordinary means of conveyance. If it was, then the plaintiff ought to recover; and the fright of her horse, the breaking of her wagon, and her inability to guide her frightened animal should not stand in the way of her recovery. These circumstances do not confer on her any rights she would not have possessed without them, nor give her any higher claim on the care of the township officers. On the other hand, they do not take from her any right to which she, in common with other travelers, was entitled in the use of the highway. It is the condition of the highway, therefore, and not the succession of accidents that befell the plaintiff, to which the attention of the jury should have been held. Was the road on that day and at that place in a condition that made it a suitable and sufficient road for public travel conducted in the ordinary manner?"

The criterion here laid down was reaffirmed in the same case (*Wagner v. Jackson Township*, 133 Pa. St. 61), and must be considered the settled law.

Tested by this rule, it is clear that there was no sufficient evidence of negligence to take this case to the jury. There was no defect in the road-bed. It was level, and safe for ordinary travel. The edge of the pond was fifteen feet outside the



line of the turnpike, and twenty-seven feet from the traveled part of the road, which was to some extent separated and distinguished from the part adjoining the pond by a line of telegraph poles. The cause of the horse's fright is unknown, but there was no evidence that it was from anything on or connected with the road or with the pond. Apart from the fright of the horse, there was nothing to show any danger to travel from the existence of the pond and the absence of a fence between it and the road. It is in this respect that the present differs from the line of cases of which *Plymouth Township v. Graver*, 125 Pa. St. 24, 11 Am. St. Rep. 867, is the exemplar. There, as here, the road-bed was without defect, but it was along and immediately adjacent to the tracks of the railroad, where the passage of trains had a natural tendency to frighten horses. The road, therefore, as it existed, contained the elements of danger to ordinary travel; and this court held that it was the duty of the township to anticipate and provide against such danger. The element of danger to ordinary travel is wanting in the present case; and therefore the jury should have been instructed that there was no sufficient evidence on which to hold the defendants liable.

Judgment reversed.

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STREBETT, J., dissented, on the ground that though the facts were undisputed, yet the question as to whether or not the defendants were negligent in failing to erect a fence or guard-rail between the highway and the dam should have been submitted to the jury for determination. On this point he said: "Whether, in consequence of the local changes made by defendants, the pond, of considerable depth, etc., formerly elevated about eight feet above the turnpike, but now on a level therewith, was dangerous, and if so, whether it was in such close proximity to the public road as to render travel thereon dangerous, etc., were, according to all well-considered authorities, questions of fact for the jury. If the changes referred to had been made by the turnpike company, and suit had been brought against it for neglect of duty in not providing a guard-rail or other suitable protection against danger, the same questions would have arisen. By permission of the sequestrator, the changes were made by defendants for their own convenience and benefit, and it thereby became their duty to provide such protection as the changed condition required, if any. The affirmance of defendants' third, fourth, and fifth points would have had the effect of taking the case from the jury, and holding, as matter of law, that the defendants, who, for their own convenience and benefit, raised the grade of the turnpike to the level of their pond, and left it in that dangerous condition, without providing any protection whatever as a substitute for the embankment and the fence which they removed, were not guilty of any negligence. This would have been a wide and dangerous departure from well-settled principles. The question of negligence, of which there was an abundance of evidence, was clearly for the jury."

**HIGHWAYS — LIABILITY OF LAND-OWNER FOR ALTERING GRADE.** — The remedy for injuries caused by altering the grade of a highway by a railroad is not against the town, but the railroad, under the Revised Statutes of Massachusetts: *Parker v. Boston etc. R. R. Co.*, 3 Cush. 107; 50 Am. Dec. 709, and note.

**HIGHWAYS — LIABILITY FOR DEFECTS IN — FRIGHTENED HORSE.** — Where objects ordinarily calculated to frighten roadworthy horses are allowed to remain on a highway, they are regarded as defects, and after due notice to the authorities the township will be liable for injuries caused thereby: *North Mannheim Tp. v. Arnold*, 119 Pa. St. 380; 4 Am. St. Rep. 650, and note; *Card v. City of Ellsworth*, 65 Me. 547; 20 Am. Rep. 722. The running away of a plaintiff's horse will not bar his recovery for injury received through a defect in a highway causing such injury during the runaway: *Ring v. City of Coloco*, 77 N. Y. 83; 33 Am. Rep. 574.

## COMMONWEALTH v. GERADE.

[145 PENNSYLVANIA STATE, 282.]

**CRIMINAL LAW — PRESUMPTION OF INNOCENCE — BURDEN OF PROOF NEVER SHIFTS.** — A person accused of crime is presumed innocent until his guilt is clearly established, and it is incumbent on the state to prove, not only to the satisfaction of the jury, but beyond a reasonable doubt, the presence of every ingredient necessary to constitute the crime charged. Presumptions of fact, however, sometimes stand for full and express proof until the contrary is established; as, that the accused is sane until he proves his insanity.

**CRIMINAL LAW — INSANITY AS DEFENSE — BURDEN AND MEASURE OF PROOF.** — When insanity is set up as a defense to the crime charged, it is incumbent on the accused to rebut the presumption of sanity, and show, not beyond a reasonable doubt, nor either clearly or conclusively, but by fairly preponderating evidence, such as is ordinarily required to prove a civil issue, that he was insane at the time of committing the crime charged.

**CRIMINAL LAW — INSANITY AS DEFENSE — MEASURE OF PROOF — INSTRUCTIONS.** — When insanity is set up as a defense to the crime charged, it must be proved by fairly preponderating evidence; and while a mere doubt as to such insanity will not justify an acquittal, yet it is reversible error to instruct that it must be "clearly proved," although substantially correct instructions as to the measure of proof required are subsequently given.

**CRIMINAL LAW — INSANITY AS DEFENSE — EVIDENCE.** — Where insanity is set up as a defense to the crime charged, and the evidence of witnesses shows that the mental condition of the accused was known to them at the time of the commission of the crime charged and afterwards, they are competent to express an opinion as to whether or not he was insane or sane at that time, and also as to his present condition of mind.

**INDICTMENT for murder.** The defendant was accused of the murder of his step-daughter, and set up insanity as a defense.

Witnesses introduced in his behalf testified that they had a knowledge of his mental condition at and subsequent to the commission of the crime. They were then asked to state whether or not, in their opinion, he was sane or insane at that time, and whether or not he had remained in the same condition of mind up to and including his trial. This question being objected to, the objection was sustained, and this ruling is assigned as error.

*J. C. Dicken and W. D. Moore, for the appellant.*

*R. H. Johnston, district attorney, and W. D. Porter, for the commonwealth.*

STERRETT, J. As stated in appellant's history of the case, "the defense upon which his counsel chiefly relied was insanity." In view of that fact, several points for charge, bearing more or less directly on the subject, were submitted. One of these is, "that under the plea of not guilty, the defendant has a right to show, by way of defense, the insanity of the defendant at the time of the killing, and that the jury must pass upon the question of the defendant's sanity or insanity, and if they find him insane at the time of the killing, acquit him by reason of insanity." This point was rightly affirmed without any qualification, and of course it is not assigned for error. Other points recited in the thirteenth, fourteenth, fifteenth, and seventeenth specifications, respectively, were answered in the negative, and therein it is alleged there was error. In the first of these, the court was requested to charge: "That the burden of proof never shifts from the commonwealth to the defendant, and the commonwealth must show, beyond a reasonable doubt, that defendant was of sound mind, memory, and discretion at the time of the killing." The learned judge's answer was: "This point is refused. As I understand the point, it is intended to say that the defense of insanity shall be established beyond a reasonable doubt; that unless it is established beyond a reasonable doubt, it would be your duty to acquit. I do not understand the law to go to that extent, and the matter will be referred to in my general charge, wherein the law as I understand it is correctly stated on this subject." If this answer was intended to be responsive to the point, its meaning is not very clear. The court was not requested to charge "that the defense of insanity shall be established beyond a reasonable doubt." On the contrary, the last clause of the point is, in substance, that the burden of proving affirmatively

and beyond a reasonable doubt the sanity of the defendant at the time of the killing was on the commonwealth. But whatever impression this and other answers to the defendant's points may have made on the minds of the jury, it may be safely assumed that in considering the evidence bearing on the defense of insanity, they were governed by what the learned judge afterwards said in that portion of his general charge to which they were specially referred for a correct statement of the law on the subject. After speaking particularly of insanity as a defense, etc., he there said, *inter alia*: "It is my duty to say to you, as the law governing the responsibility of men for their acts, that in all cases every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary is proved to the satisfaction of the jury; and to establish a defense on the ground of insanity, it must be clearly proved that at the time of committing the act the party accused was laboring under such a defect of reason from disease of the mind as not to know the nature of the act he was doing, or if he did know it, that he did not know he was doing what was wrong. This looks like a fair definition of what insanity is. That is what is required to relieve him of responsibility for his acts."

Without questioning the general correctness of what was said, in that connection, as to the kind of insanity that constitutes a defense to an act which would otherwise be punishable as criminal, we think the degree of proof necessary to sustain such a defense was too strongly stated in saying "it must be clearly proved." This was imposing on the defendant a greater burden than the law requires.

In harmony with the humane principle of the criminal law, that every person accused of crime shall be presumed innocent until his guilt is clearly established, it is incumbent on the commonwealth to prove, not only to the satisfaction of the jury, but beyond a reasonable doubt, the presence of every ingredient necessary to constitute the crime charged in the indictment. That burden, as was said in *Turner v. Commonwealth*, 86 Pa. St. 54, 27 Am. Rep. 683, never shifts, but rests on the prosecution throughout; so that in all cases a conviction can be had only after the jury has been convinced, beyond a reasonable doubt, of the defendant's guilt. It necessarily follows, that if the evidence is such as to leave a reasonable doubt in the minds of the jury as to the existence of any necessary ingredient of the crime charged, they should give the defendant the

benefit of that doubt. But presumptions of fact sometimes stand for full and express proof until the contrary is shown. For example, inasmuch as sanity is the normal condition of man, every one is presumed to be sane, and that presumption holds good, and is the full equivalent of express proof, until it is successfully rebutted. When insanity of the defendant is set up as a defense, it is incumbent on him to rebut the ordinary presumption of sanity, and show, not beyond a reasonable doubt, nor either clearly or conclusively, but by fairly preponderating evidence, such as is ordinarily required to prove a fact in civil issues, that he was insane at the time of committing the alleged crime. In *Lynch v. Commonwealth*, 77 Pa. St. 205, 213, the trial judge refused to charge, "that if the jury have a reasonable doubt as to the condition of the defendant's mind at the time the act was done, he is entitled to the benefit of such doubt, and they cannot convict"; and for further answer to the point, said: "The law of this state is, that where the killing is admitted, and insanity or want of legal responsibility is alleged as an excuse, it is the duty of the defendant to satisfy the jury that insanity actually existed at the time of the act; a mere doubt as to such insanity will not justify the jury in acquitting on that ground." That instruction was approved by this court, and substantially the same instruction was afterwards sanctioned in *Ortwein v. Commonwealth*, 76 Pa. St. 421, 425; 18 Am. Rep. 420; and other cases. In *Coyle v. Commonwealth*, 100 Pa. St. 578, 45 Am. Rep. 897, the same rule of evidence was again recognized. It was further held to be error, in that case, to instruct the jury that the defense of insanity should be proved by clearly preponderating evidence. The instruction should have been "fairly preponderating," instead of "clearly preponderating evidence." Speaking of the degree of proof required by the words employed in that case, Mr. Justice Mercur said: "It is demanding a higher degree of proof than the authorities require. It may be satisfactorily proved by evidence which fairly preponderates. To require it to clearly preponderate is practically saying it must be proved beyond all doubt or uncertainty. Nothing less than this will make it clear to the jury." As applied to the degree of proof required to rebut the presumption of sanity, and sufficiently prove the existence of insanity, there is no appreciable difference between the expressions "clearly proved" and "proved by clearly preponderating evidence." If there is any difference, the former calls for the higher degree of proof. It is

almost equivalent to saying "proved beyond a reasonable doubt"; because if any doubt as to the existence of a particular fact exists, it cannot be said to be "clearly proved."

It is true that the learned judge, in another part of his somewhat lengthy charge, said to the jury: "You have to be satisfied of his insanity by the preponderance of the evidence. He has to establish, in other words, his insanity, not by the rule of a reasonable doubt, but by the testimony, what the preponderance of the evidence shows." But with two measures of proof before them, one substantially correct and the other erroneous, how is it possible for us to determine which the jury adopted? There should be nothing left to conjecture, especially in a capital case. It is enough to know that the jury may have been misled by erroneous instructions on a point vital to the defense.

The testimony referred to in the sixth, eighth, ninth, and tenth specifications appears to have been neither incompetent nor irrelevant, and we think it should have been admitted. Neither of the remaining specifications of error requires special notice. That part of the charge embraced in the eighteenth specification of error contains some expressions of opinion, etc., that might have been profitably omitted, but we are not prepared to say that they are positively erroneous.

Judgment reversed, and a *venire facias de novo* awarded.

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**HOMICIDE — BURDEN OF PROOF.** — Simple proof of homicide will not establish the crime of murder. The prosecution must affirmatively prove the existence of malice in the perpetrator in order to put him upon his defense: *State v. Deschamps*, 42 La. Ann. 567; 21 Am. St. Rep. 392, and note; *State v. Dierberger*, 96 Mo. 666; 9 Am. St. Rep. 380; *People v. Lemperla*, 94 Cal. 45.

**CRIMINAL LAW — INSANITY AS A DEFENSE TO CRIME — BURDEN OF PROVING INSANITY.** — Where insanity is set up as a defense to crime, the accused is not required to prove it beyond a reasonable doubt: *Armstrong v. State*, 27 Fla. 366; 26 Am. St. Rep. 72, and note. An accused, if he relies on the defense of insanity, is bound to prove his insanity by a preponderance of creditable evidence, where his guilt has been proved beyond a reasonable doubt: *State v. Trout*, 74 Iowa, 545; 7 Am. St. Rep. 499, and note; *Parsons v. State*, 81 Ala. 577; 60 Am. Rep. 193, and extended note; *State v. McCoy*, 34 Mo. 531; 86 Am. Dec. 121, and note; *People v. McNulty*, 93 Cal. 427; *State v. Williamson*, 106 Mo. 162; *State v. Lewis*, 20 Nev. 333.

**ROBB v. CARNEGIE BROTHERS AND COMPANY.**

[145 PENNSYLVANIA STATE, 224.]

**NUISANCE — UNDESIRABLE BUSINESS.** — An adjoining land-owner is without legal remedy for the depressing effects upon its desirability and market value, caused by the proximity of an undesirable business; but if such business is conducted in such manner as to injuriously affect the use of such land or its occupants, the owner may recover damages therefor.

**NUISANCE — COKE MANUFACTORY — INJURY TO ADJOINING LAND.** — One engaged in manufacturing coke from coal purchased at a remote place is liable in actual damages for substantial injury to the crops and land of an adjoining owner, caused by the smoke and vapors necessarily arising from such business, conducted in careful manner, upon an appropriate site owned by the manufacturer.

**NUISANCE — COKE MANUFACTORY — INJUNCTION.** — A coke manufactory, conducted in a careful manner upon an appropriate site, but which substantially injures the crops and soil of an adjoining owner, will not be restrained by injunction, but such owner is entitled to recover actual damages in an action at law.

**NUISANCE — COKE MANUFACTORY — MEASURE OF DAMAGES — EVIDENCE.** — In an action by an adjoining owner to recover for injury to his crops and soil, arising from a coke manufactory, situated on a well-selected and secluded site, and carefully operated, such owner is entitled to recover only his actual loss in the products of his farm or the destruction of his soil, or both, sustained within the period of the statute of limitations. He is not entitled to exemplary damages, nor is the rule as to damages for a taking by eminent domain applicable; and evidence which does not tend to prove the actual damages sustained is inadmissible.

*J. F. Wentling, Paul H. Gaither, J. A. Marchand, D. A. Miller, George Shiras, Jr., W. F. McCook, P. C. Knox, and James H. Reed, for the appellants.*

*D. S. Atkinson and J. M. Peoples, for the appellee.*

**WILLIAMS, J.** This case was tried with considerable care in the court below, and was in most respects well tried. Some questions, however, were raised and considered on the trial which were not necessarily involved, and which hindered rather than helped the court and jury in reaching a correct result. For this reason, and because the case as it is presented is one of considerable general importance, it seems desirable that the position of the parties, and the principles by which their relative rights are to be adjusted, should be briefly considered. This may be done by answering the following questions: 1. Has the plaintiff shown a cause of action for which he can recover in a court of law? 2. If he has, what is the measure of his damages? 3. Was the evidence, which was admitted under objection, relevant to the issue before the jury?



The plaintiff shows that prior to 1871 he was the owner of a farm in Westmoreland County, on the uplands north of Brush Creek. His cultivated fields began about one thousand feet from and about three hundred feet above the stream, and extended back to and beyond his dwelling and farm-buildings, which were about one half-mile from the stream. He shows that in 1871 the defendants bought a tract of land in the valley, and extending up the slope some three or four hundred feet, on which they erected coke-ovens on the flat on the north side of the creek. He alleges that the smoke and gas from these ovens passed over his farm, injuring thereby his crops, diminishing the productiveness of the soil, and the desirability of his house as a place of residence. Evidence was given on the trial in support of this allegation. The defendants deny that the plaintiff has suffered injury in his crops, his soil, or the comfort of his home; and they further deny that the injuries alleged, if actually sustained, would entitle the plaintiff to recover, and for this they give the following reasons: (a) Such injuries are the natural and necessary result of the development by the owner of the resources of his own land, as in *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126; 57 Am. Rep. 445; (b) they result from a reasonable use of his own land for a lawful purpose, as in *Huckenstine's Appeal*, 70 Pa. St. 102; 10 Am. Rep. 669; (c) they result from the pursuit of a lawful calling, in a lawful manner, without either negligence or malice on the part of the owner or his employees, as in *Pennsylvania R. R. Co. v. Lippincott*, 116 Pa. St. 472; 2 Am. St. Rep. 618.

In Sanderson's case the land of the coal company was coal-land. Its value could be realized by the owners in no other way than by bringing the coal to the surface, so that it could be prepared for the market. In the process of mining, subterranean veins of water are necessarily opened, and the water accumulating in the mines must be brought to the surface, where it naturally finds its way into the surface streams, and pollutes them. If this could not be done, a great industry would be interfered with, and the owner of the coal-land denied the exercise of the rights of ownership on his land, for the benefit of a neighboring owner, whose title was no greater or higher than his own. The maxim, *Sic utere tuo ut alienum non lædas*, was therefore neither suspended nor modified in Sanderson's case. The coal company was using its own land in the only manner practicable to it. The harm done thereby to oth-

ers was the least in amount consistent with the natural and lawful use of its own. If this use was to be denied to the coal company because some injury or inconvenience to others was unavoidable, then the result would be practical confiscation of the coal-lands for the benefit of householders living on lower ground. But the defendants are not developing the minerals in their land, or cultivating its surface. They have erected coke-ovens upon it, and are engaged in the manufacture of coke. Their selection of this site, rather than some other, is due to its location and to their convenience, and has no relation to the character of the soil, or to the presence or absence of underlying minerals. The selection was no doubt a wise one, quite secluded, and quite convenient to the several mines from which the material was to be obtained for the making of coke; but it was the selection of a manufacturing site, and is subject to the same considerations as though glass or lumber or iron had been the commodity to be produced, instead of coke. The rule in *Sanderson's case* has therefore no application to the facts of this case. The injury, if any, resulting from the manufacture of coke at this site, is in no sense the natural and necessary consequence of the exercise of the legal right of the owner to develop the resources of his property, but is the consequence of his election to devote his land to the establishment of a particular sort of manufacturing, having no natural connection with the soil or the subjacent strata.

The rule in *Huckenstine's Appeal*, 70 Pa. St. 102, 10 Am. Rep. 669, is equally inapplicable. The land of the appellant in that case had upon it a deposit of fine brick-clay, which could be made into bricks with profit, if this was done near the pit from which the clay was taken. This is the usual, and probably a necessary, way of converting the clay into bricks. An effort was made to enjoin against the burning of the bricks by Huckenstine on the field where the clay was obtained. The injunction was refused, and it was held that, upon the case as presented, Huckenstine was making a reasonable use of his own land, which equity would not interfere with. Whether he would have been liable in an action at law for any substantial injury he might do to a neighbor by the burning of bricks was not before the court, and was not considered. We think it is true, as held by the judge of the court below, that the evidence in this case would not justify an injunction. It shows a selection of a site as well adapted to the business, and as remote from dwellings, as any in that region. To enjoin the

manufacture of coke at such a site would amount to a prohibition of its manufacture, and the destruction of vast allied and dependent industries of immense value to the public as well as to those directly engaged in them. An injunction is not of right, but of grace, and will never be issued by a court of equity when it will inflict a greater injury than it will prevent. In such a case, the injured party will be left to his redress at law. No more than this is fairly covered by *Huckenstine's case*. The plaintiff in this case is therefore in the right court, and if he is substantially hurt by the use to which the defendants have seen fit to devote their land, we see no reason why he may not recover, unless it is found in the last of the positions taken by the defendants, for which *Lippincott's case* is cited.

It is a fundamental principle of our system of government that the interest of the public is higher than that of the individual, so that when these interests are in conflict, the latter must give way. If the individual is thereby deprived of his property without fault on his part, he is entitled to compensation; but if he is affected only in his tastes, his personal comfort, or pleasure, or preferences, these he must surrender for the comfort and preferences of the many. Thus highways are necessary to the public business and comfort. Some noise and dust are necessarily occasioned by the legitimate use of them. This may be disagreeable, perhaps in some cases positively harmful, to some one or more of the persons living along them; but for this there is no remedy, at law or in equity. It is one of the necessary consequences of subjecting the individual to the public in those things as to which their interests are in conflict. Railroads have become the great highways of travel and commerce. The turnpike and canal have been superseded, and the people and their products are transported at a great advance in speed and comfort over the modern highway, by the power of steam. The law recognizes the public character of these highways. Their presence is necessary to the prosperity and comfort of the public. To some persons who live near them, as to some persons who live upon a busy city street, the incessant roar of business and the dust of passing vehicles or trains may be unpleasant or painful; but whether such persons live upon a country road, a paved street, or a railroad, they are alike remediless. No action will lie against the municipality, the turnpike, or the railroad company for the noise and dust caused by the legitimate use or

operation of the highway in either case. For negligence or malice the wrong-doer is liable to the party injured, but for the lawful use of the road, in the customary manner, no liability attaches to the traveler or owner. The railroads are built, as is the turnpike or the street, under laws regulating their construction and use in the interest of the public which is to be served by them. The right to operate railroads is a necessary incident to the right to build them, and this was held in Lippincott's case. But the production of iron or steel or glass or coke, while of great public importance, stands on no different ground from any other branch of manufacturing, or from the cultivation of agricultural products. They are needed for use and consumption by the public, but they are the results of private enterprise, conducted for private profit, and under the absolute control of the producer. He may increase his business at will, or diminish it. He may transfer it to another person or place or state, or abandon it. He may sell to whom he pleases, at such price as he pleases, or he may hoard his productions, and refuse to sell to any person or at any price. He is serving himself in his own way, and has no right to claim exemption from the natural consequences of his own act. The interests in conflict in this case are, therefore, not those of the public and of an individual, but those of two private owners who stand on equal ground as engaged in their own private business. Lippincott's case is therefore no reply to the plaintiff's case.

What, then, is the measure of damages? The declaration charges an injury to the trees and crops growing on the surface, and a permanent injury to the soil, by the deposit upon it from the passing smoke and gas of sterilizing and poisonous substances. To the first of these the statute of limitations was properly applied. During two of the six years open to inquiry, the farm was in the possession of a tenant, who paid what is admitted to have been a full rent for it. The crops for those two years should therefore be excluded from consideration. As to the remaining four years, if the crops were so affected as to reduce their quantity or value, the shrinkage upon each year's crops should be shown in bushels or tons, or approximated as nearly as possible. For, the acreage in wheat or corn in any one of these four years, for example, being shown, and the yield per acre, a comparison of the crop with that raised on the same farm before the ovens were built could be made, and so far as the difference was shown to be due to

The smoke or gas, it would afford some basis for an estimate of the damage sustained on that year's crops. In this manner the actual injury to the crops, if any, could be gotten at pretty nearly. As to a permanent injury to the soil by the deposit of injurious particles upon it, a chemical analysis will afford the only safe guide. Differences in the amount of the crop might be due to the effect of the smoke on the growing plant, to negligent tillage, to exhaustion of the soil by long cropping, or to many other causes; but if, as some of the witnesses have testified, a crust of foreign and sterilizing substances has been deposited over this farm, varying from a quarter to a third of an inch in thickness, specimens of it can and should be produced, and its composition and the effect of its presence ascertained and explained to the jury by those competent to speak on the subject. This is a question susceptible of a clear and satisfactory solution by the application of scientific tests, which the court and jury should have the benefit of. If the result is to show a permanent injury to the soil, which impairs its productiveness to an appreciable degree, the extent of the loss in the value of the farm can be readily computed. If such permanent impairment is not made to appear, this part of the plaintiff's claim should be rejected altogether. The fact that the plaintiff may regard his home as less desirable than before, because of the proximity of an undesirable business or of undesirable neighbors, or the further fact that its selling value has been reduced by reason of such proximity, affords no ground for a recovery. The location of a livery-stable, a restaurant, a distillery, and many other kinds of business close to one's home might diminish its comfort and its market value, but the owner would be without legal redress, so far as the effect of mere proximity is concerned. If, however, the business was so conducted as to affect the use of adjoining property, or the health of its occupants, these tangible and substantial injuries, capable of measurement by a pecuniary standard, might sustain an action for damages.

The ordinary rule for the ascertainment of damages, where land has been entered and appropriated under the right of eminent domain, does not furnish a measure of the plaintiff's right to recover in this case, for the reasons already given. Where an entry and seizure have been made, the effect of the seizure and appropriation of part of the land of the owner to a particular use is to be considered, as well as the value of what is taken. This can be best adjusted by ascertaining the sell-

ing value of the whole property before the entry, and after it has been made. The difference, if any, shows the actual loss which the owner has suffered. But in this case there has been no entry upon or appropriation of the plaintiff's land. What he alleges is, that the prosecution of the business of making coke by the defendants on their own land has hurt his crops and injured his soil. They have the right to make coke. If the establishment of that business near the plaintiff affects the selling value of his farm, he can no more recover for that than he could recover against the saloon-keeper or the livery-man because the location of their business near him had made his property unsalable. The nature of the business is therefore to be left out of view. The sole question is, What harm has been done to the plaintiff by or as the direct result of the prosecution of the defendants' business at a place where they had a legal right to carry it on? The plaintiff might honestly think, and his neighbors might be willing to testify, that the mere location of the ovens on adjoining land reduced the value of his farm thirty or fifty per cent or more, and a comparison by them of the value before and after the building of these ovens would include this element, for which there can be no recovery.

What has been now said substantially disposes of our question relating to the testimony objected to. The second assignment of error is sustained. The question objected to should have been excluded because it called for no fact, but for a lumping estimate which opened the way for the witness to introduce considerations that we have seen had no place in the adjustment of the damages. The question referred to in the third assignment should have been excluded, for reasons already given. The seventh assignment is also sustained. It was of no sort of consequence where the defendants obtained the material which they used in making coke, or what price they paid for it, or what the miners who brought it to the surface were paid for mining it; and such questions should have been excluded. The ninth assignment must also be sustained. The question was, not what purposes the plaintiff might have devoted his farm to, and what damages he would have sustained in that case, but to what purposes had he devoted it, and to what extent had he been interfered with by the defendants' business. An examination of the evidence shows that the plaintiff purchased his farm, containing eighty-two acres, for four thousand dollars, a few years before the ovens were built-



Several years after they were built he bought twenty acres adjoining, which contained coal which he mined and sold to the employees of the defendants. So far as the evidence indicates, the latter piece was not farmed, but kept and used for mining coal. For the injury to four years' crops, and for permanent injury to his soil, the plaintiff recovered nearly one thousand dollars more than his farm proper cost him, and still finds it to his advantage to reside upon it and to cultivate it. The fact that such a verdict was rendered shows that the court and jury must have been misled to some extent by the irrelevant testimony, and by the improper measure of damages which the jury was thus left to apply.

It only remains to consider briefly the twelfth assignment of error. The learned judge said to the jury: "After much thought, we have arrived at these conclusions: 1. That the owners of coal-lands may develop and operate the same, even to the injury of adjoining land-owners, without remedy on the part of the latter, unless malice or negligence be shown; 2. That a court of equity will not restrain the operation of works of an injurious nature where the best possible place to do the least injury to others has been selected; 3. That while equity will not restrain, law will give a remedy where actual, positive, serious injury has been done to another, by bringing upon adjacent land and manufacturing material not part of the land, whether such harm be done to health or property."

We cannot see that the appellants were hurt by this instruction. The first proposition is no more than a statement of the rule which was held in Sanderson's case. The second is all that the appellants could ask, and as a general rule, is well settled. If there is any error in the third, it is in the concession that the mine-owner is under less obligation to his neighbors when he makes coke upon the track from which the coal is mined than when he makes it elsewhere. If this concession was mistaken, as perhaps it was, it did not lay any burden on the appellants, and they have no right to complain of it. Whether one who mines coal or petroleum or lead on his own land has, by virtue of that fact alone, a right to manufacture or refine such product on the tract from which it was obtained, under circumstances which would prevent its manufacture, or render him liable for damages if he manufactured on some other tract, is a question not raised by the facts of this case. If the relation of the miner to his product, or the surface to



the underlying minerals, could confer exemption from liability for the consequences of the manufacture of the material mined, where the process was conducted on the same tract, the defendants were not within the range of such exemption. They did not mine the coal they used. It was not mined on the land upon which the coke-ovens stood. They were therefore under the general rule, and not within the exemption, if such exemption really exists. At the same time, the location of these parties and the industries of the region are not to be lost sight of. The plaintiff's farm is in a region in which bituminous coal is obtained in large quantities. He himself mines coal upon his own land for sale. The conversion of coal into coke, to supply fuel for the great iron and steel mills of western Pennsylvania, is one of the great industries of the region. Many millions of money are invested in and many thousands of men are employed about its production. It has been largely instrumental in the development, growth, and general prosperity of the region. The plaintiff shares the general benefits, and seems to possess some advantages that are special, and grow directly out of the establishment of these works near him; for he has been thereby provided with customers for his coal and his farm products at his own door. These considerations should be borne in mind in adjusting the damages, if any have been sustained; so that the plaintiff, while he recovers for his actual loss in the products of his farm or the destruction of his soil, as the evidence may show the facts to be, shall not be allowed exemplary damages; and so that the defendants shall not be treated as wrong-doers in the establishment of their plant on a well-selected and secluded tract of land belonging to themselves.

As this case goes back for a new trial, it is quite proper for us to add that the trial judge is, in an important sense, the thirteenth juror; and when the amount of the verdict shows that it must have been arrived at by the adoption of an erroneous measure of damages or a mistake in computation, he should not hesitate to set it aside.

The judgment is reversed, and a *venire facias de novo* awarded.

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NUISANCE — UNDESIRABLE BUSINESS — DAMAGES. — In an action to enjoin the continuance of a nuisance and for damages, it is not a good defense that the business alleged to be a nuisance is lawful *per se*, and the use made by defendant of his property is reasonable: *Hurlbert v. McKone*, 55 Conn. 31; 3 Am. St. Rep. 17, and note; extended note to *Appeal of Pennsylvania Lead*

Co., 42 Am. Rep. 540. Where the business is lawful, the injury complained of must be shown to have been real and substantial, and not a trifling annoyance, such as is necessarily incident to the business complained of: *Price v. Grant*, 118 Pa. St. 402; 4 Am. St. Rep. 601; *Pennsylvania R. R. Co. v. Marchant*, 119 Pa. St. 541; 4 Am. St. Rep. 659.

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## WESTERN AND ATLANTIC PIPE LINES v. HOME INSURANCE COMPANY.

[145 PENNSYLVANIA STATE, 346.]

### INSURANCE — PROPERTY REMOVED BY FLOOD — LIABILITY FOR LOSS. —

Where a policy of insurance against loss or damage by fire is issued on oil while contained in a tank situated on certain lands, the fact that the tank has been removed by a flood about four or five hundred feet from where it stood when such oil was insured, but not off the premises described in the policy, will not avoid the policy, nor relieve the insurer for the loss of such oil by fire after the removal of the tank.

INSURANCE — CONSTRUCTION OF POLICY. — The terms of a fire insurance policy should be liberally construed, and if any doubt exists as to their meaning, it should be resolved in favor of the insured, or if the words employed are susceptible of two interpretations, that which will sustain the claim of the insured should be adopted.

INSURANCE — REMOVAL OF PROPERTY INSURED — WARRANTY. — Where oil in a tank located at a certain place is insured against loss by fire, the description of the location of the tank, regarded in the nature of a warranty, can only be construed as a warranty of location at the time the insurance was effected, and that the insured will not voluntarily change its location; but it cannot be construed as an absolute warranty that the tank will remain in the same location during the life of the policy, and if it is removed by flood or any other "visitation of providence," the insurer is liable for the loss of the oil insured if burned while in such tank.

INSURANCE — DEFENSES — ESTOPPEL. — Where oil in a tank located at a certain place, and insured against loss by fire, is subsequently destroyed, the insurance company acknowledging the loss and denying liability to pay therefor, on the sole ground that the tank has been removed from its original location by a "visitation of providence" since the insurance issued, it is estopped from subsequently setting up the defense that the oil insured was not the property of the assured.

INSURANCE — DEFENSES — ESTOPPEL. — Where an insurer, after loss, relies upon a specified defense alone, and so notifies the assured, he will not be permitted to retract it, and set up a new and different defense after the insured has acted upon the defense announced, and incurred expense in consequence of it.

INSURANCE — PRESUMPTION AS TO KNOWLEDGE OF INSURER. — An insurance company when it issues a policy is presumed to know the corporate powers of the insured, the nature of its business, and the usual and customary methods of conducting the business pertaining to the insured property.

INSURANCE — CORPORATION — INSURABLE INTEREST. — A corporation in-

vested with the right to transport, store, insure, and ship petroleum has an insurable interest in the petroleum in its possession, to the extent of its value, and for the purposes of insurance may be considered as its owner.

**INSURANCE — PRESUMPTION OF KNOWLEDGE OF INSURER.** — Where an insurance policy is issued without any application or written request, describing the interest of the insured in the property, and it does not appear that any actual representation of any kind was made by the assured, it will be presumed that the policy was written upon the knowledge of the insurer, and intended to cover in good faith the interest of the assured in the property.

**INSURANCE — INSURABLE INTEREST.** — AGENTS, COMMISSION MERCHANTS, OR OTHERS having the custody and being responsible for property may insure in their own names, and may recover from the insurer not only a sum equal to their own interest in the property by reason of any lien for advances or charges, but the full amount named in the policy, up to the value of the property.

**INSURANCE — WAIVER — INTEREST.** — When an insurer absolutely denies liability for a loss, he thereby waives the benefit of a provision in the policy giving sixty days for adjustment and payment of loss, and is liable for interest from its date.

*J. H. Murdoch and W. S. Parker, for the appellant.*

*T. F. Birch, J. W. Donnan, and A. Donnan, for the appellee.*

**STERRETT, J.** This action is on a policy of insurance issued by the Home Insurance Company, defendant, insuring the Western and Atlantic Pipe Lines, for one year from June 28, 1888, against loss or damage by fire, to the amount of \$2,500, "on oil while contained in the iron crude-oil tank known as No. 1, on plan situate, detached 273 feet, on the Johnson farm at Johnson's station, on the line of the Washington branch of the Pittsburgh, Cincinnati, and St. Louis railroad, on leased ground, Washington County, Pennsylvania." By necessary implication, the verdict establishes the fact, that during the life of the policy, over three thousand six hundred barrels of oil were destroyed by fire, while in said "iron crude-oil tank known as No. 1," on the plan of oil-tanks at Johnson's station. The jury found in favor of the plaintiff for the value of the oil thus destroyed.

The company defendant, after being fully advised as to the loss, etc., denied its liability on two grounds: 1. Because the tank containing the oil insured had been removed "by an unforeseen disaster, in the shape of a flood," and carried about four or five hundred feet from the position it occupied when the policy was issued; 2. Because the oil contained in said tank did not belong to the plaintiff company, but to its cus-

**tomers, for whom it was held in storage, which fact was not stated on the face of the policy.**

**Conceding the fact that, at the time of the fire, the tank had been removed by a flood about four or five hundred feet from the position in which it stood when the oil was insured, but not off the premises described in the policy, the plaintiff contends that the insurance company was not thereby relieved from liability for the loss. In that we think it is right.**

**The object of the contract was indemnity against the destruction of oil described as "contained in the iron crude-oil tank known as No. 1," etc. With the view of attaining that object, the terms of the policy should be construed liberally. If any doubt exists as to their meaning, it should be resolved in favor of the insured rather than in the interest of the underwriter. When words employed in a policy of insurance are susceptible of two interpretations, that which will sustain the claim of the insured should be adopted: Wood on Insurance, 145; May on Insurance, 182. Tested by these well-recognized principles of interpretation, the position contended for by the defendant company is untenable. In substance, its position is, that the above-quoted description of the property insured is, in effect, a warranty that in case of fire the oil destroyed shall not only be contained in said iron tank, but that the tank itself shall remain where it was when the insurance was effected; otherwise the insurance company will not be liable. Authorities cited in support of that position, where property insured as contained in certain barns, houses, etc., was destroyed after removal to other buildings, have no application to the case before us. In those cases, there was necessarily a failure to show that the insured property was in the designated buildings when destroyed. In this case, the jury must have found that the oil insured was destroyed "while contained in the iron crude-oil tank known as No. 1," on the plan of tanks at Johnson's station, and that, we think, fully satisfies the terms of the contract. The parties were not contracting with reference to an insurance upon the tank, but only upon the oil contained in it. With that construction of the company in view, the learned president of the common pleas rightly instructed the jury as follows: "If you conclude that this tank was picked up bodily by the flood, and floated down the stream, and lodged from three to five hundred feet away from the place where it was constructed, against the abutments of the bridge, and remained intact, and in that way held the oil, as**

an oil-tank would hold oil, so that it could have been recovered by the company, and while there, in place of on the original foundation, the oil in the tank was burned, then the contract of indemnity would be binding, and the defendant would be liable for such loss as the plaintiff might sustain by reason of the fire on their proportionate share of the loss." The jury, under this instruction, having found for the plaintiff and assessed its damages, the necessary implication is, that they found the facts of which the instruction is predicated to be true; that the oil-tank No. 1 contained and held the oil, for the value of which they assessed damages in favor of the plaintiff, until it was destroyed by fire, etc.

But assuming, merely for argument's sake, that the description of the tank's location may be regarded as in the nature of a warranty, it can only be construed as a warranty of location at the time the insurance was effected, and not that the tank would thereafter remain in the same location: *Lycoming Ins. Co. v. Mitchell*, 48 Pa. St. 367. As a statement of then existing facts, it is not even pretended that the description of the location of the tank, etc., was not strictly true. If it was intended to make the continued location of the tank, at the precise point where it then was, a condition of the underwriter's liability, it would have been an easy matter to have said so. It is not the province of courts to indulge in conjectures favorable to such insurance companies as are disposed, upon mere technicalities, to avoid the payment of honest claims. Cases are not unfrequent in which statements in regard to the use and character of buildings, etc., are construed as merely descriptive of the risk at the time the application is made, and not as a warranty that there shall be no change during the life of the policy: Wood on Insurance, secs. 444, 446, and cases there cited. In *Everett v. Continental Ins. Co.*, 21 Minn. 76, a thrashing-machine was insured as "stored in a certain barn on section 36," etc.; and it was held that this was a mere matter of description, operating to identify the property, and not a promissory stipulation on the part of the insured, nor a condition on the part of the insurer. But giving the defendant the benefit of the broadest construction, the language used in describing the location of the oil insured cannot amount to anything more than an implied warranty of the plaintiff company that it will not voluntarily change its location. This construction appears to have been recognized in *Sillem v. Thornton*, 3 El. & B. 868, and was perhaps warranted by the

facts of that case. Even in that view, we have, on the one hand, only an implied warranty that the insured will not voluntarily change the location of the tank containing the oil, and on the other, defendant's admission, in its affidavit of defense, that the location of the tank was changed "by a visitation of providence."

Another ground of defense is, that the oil in question did not belong to plaintiff, but to its customers, for whom it was held in storage. For some reason, best known perhaps to the party who on behalf of the defendant wrote the sympathetic letter of October 11, 1888, and made the affidavit of defense April 16, 1889, this ground of defense was not even hinted at in either of those papers, and for aught that appears, was a mere afterthought. In the letter he says: "We regret exceedingly the loss sustained by your company, and would be pleased to reimburse you if we could see wherein you had any claim upon us, either in law or equity. We insured oil in an iron tank located in a safe position, upon a good foundation, and charged you a premium which we considered adequate, in view of its position; but an unforeseen disaster, in the shape of a flood, carried the tank from its position to a more dangerous one, whereby it was destroyed." In the affidavit substantially the same defense, viz., removal of the tank "by a visitation of providence," etc., is solely relied on. It is not even pretended that there was any fraudulent concealment of ownership of the property, or that any untruthful representation was made, upon the faith of which the policy was issued; nor is it claimed that the defendant company was not fully aware of the exact situation and ownership of the oil when it accepted the risk. It had notice, by the proof of loss furnished by plaintiff, as to the manner in which the oil was held, but no objection on that ground was interposed or even intimated. Defendant's liability was denied solely on the ground that the tank containing the oil had been removed "by a visitation of providence."

The supplemental defense, afterwards sprung upon the plaintiff, that it was not the owner of the oil, might well be disposed of by saying it came too late: *Brink v. Hanover Fire Ins. Co.*, 80 N. Y. 108; *Castner v. Farmers' Mut. F. Ins. Co.*, 50 Mich. 273; *Vos v. Robinson*, 9 Johns. 192; *Stayton v. Graham*, 139 Pa. St. 1. In *Brink v. Hanover Fire Ins. Co.*, 80 N. Y. 108, the company denied liability on the ground of fraud, and so declared to the assured. After suit brought, it raised the question as to time of the filing proofs of loss, etc. In

denying its right to do so, Chief Justice Church said: "I think it was estopped from so doing. The plaintiffs' claim was challenged for fraud, and fraud only. They acted upon it, and brought an action incurring large expenses in its prosecution; *non constat*, if the failure to file the proofs in time had been insisted on, but that the plaintiffs would have acquiesced and refrained from prosecuting, and thus they might be injured by the change of ground on the part of the defendant. Every consideration of public policy demands that insurance companies should be required to deal with their customers with entire frankness. They may refuse to pay without specifying any ground, and insist upon any available ground; but if they plant themselves upon a specified defense, and so notify the assured, they should not be permitted to retract after the latter has acted upon their position as announced, and incurred expenses in consequence of it.

But aside from what has been said in answer to the last-mentioned ground of defense, we think it is also successfully met by the facts connected with the contract of insurance, etc. The plaintiff is a corporation chartered under the law of April 29, 1874, and supplements, and invested with the right to transport, store, insure, and ship petroleum, and under our constitution is prohibited from engaging in any other business than that specified in its charter. It should be presumed that the insurance company was cognizant of these facts, and contracted with reference to them; but whether it was or not, it is certainly chargeable with knowledge of the usual and customary methods of conducting the business pertaining to property which it insured: *Citizens' Ins. Co. v. McLaughlin*, 53 Pa. St. 487. While in one sense the plaintiff was not the owner of the oil, yet in so far as risk from loss by fire was concerned, it may, to all intents and purposes, be considered as the owner. According to the contract made with its customers, it was bound to protect, by insurance, the oil in its tanks at its own expense. In case of destruction by fire without insurance, it would have been bound to its customers to make good the loss. To the extent of the value of the oil, therefore, it certainly had an insurable interest, and, in a certain sense, was at least quasi owner of the oil. The policy in suit issued without any application or written request describing the interest of the insured in the oil, and it does not appear that any actual representation of any kind was made by the insured. In view of these circumstances, the language of our



brother Williams in *Philadelphia Teal Co. v. British American Assur. Co.*, 132 Pa. St. 236, 19 Am. St. Rep. 596, is especially applicable. He there said: "We ought to assume that a policy written under such circumstances was written upon the knowledge of the representative of the insurer, and intended to cover in good faith the interest which the insured had in the buildings. Fraud is never to be presumed, and in this case no fraudulent representation is shown or alleged, unless it can be deduced from the statements of the insurer, made, as we must presume, on the knowledge of its representative, and for which the insured is in no manner responsible. We must also remember that this policy is to be interpreted most strongly against the company whose contract it is. Applying these principles to the question now raised, we conclude that the policy written on the knowledge of the insurer was made in view of the facts of the case, and was intended to cover such interest in the buildings as the insured had." So in the case before us, the defendant, having insured the oil contained in tank No. 1, without any representation as to the quantum of plaintiff's interest therein, must be considered as having insured it against any loss which the plaintiff would suffer by fire. As already observed, the plaintiff had a right, and was bound by its contract with its customers, to protect the oil by insurance, so that its value could be accounted for to them in case of loss by fire. As was said in *Waring v. Indemnity F. Ins. Co.*, 45 N. Y. 606, 6 Am. Rep. 146: "Agents, commission merchants, or others having the custody of and being responsible for property may insure in their own names, and they may in their own names recover from the insurer not only a sum equal to their own interest in the property by reason of any lien for advances or charges, but the full amount named in the policy, up to the value of the property." To the same effect is Story on Agency, 126.

The testimony referred to in the first, second, and third specifications was rightly admitted. It tended to prove plaintiff's interest in the oil, and consequent right to insure.

The only other specification that requires further notice is the ninth, in relation to interest. A sufficient answer to that is, the company denied *in toto* its liability, and was therefore not entitled to the benefit of the provision in the policy giving sixty days for adjustment and payment of loss: *Nevins v. Rockingham M. F. Ins. Co.*, 25 N. H. 22; *Ætna Ins. Co. v. Maguire*, 51 Ill. 342; *Phillips v. Protection Ins. Co.*, 14 Mo. 220;

*Indiana Mut. F. Ins. Co. v. Routledge*, 7 Ind. 25; Myer's Fed. Dec. 585: In *Aetna Ins. Co. v. Maguire*, 51 Ill. 342, it was held that such a clause applies only where the insurance company agrees to pay, or is undecided in regard to paying, but not when it peremptorily refuses to pay the loss. Further notice of the specifications is unnecessary. There is no merit in either of them.

Judgment affirmed.

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**INSURANCE — POLICY, HOW CONSTRUED.** — A fire insurance policy will be most strongly construed against the insurer: *Benshaw v. Missouri State etc. Ins. Co.*, 103 Mo. 595; 23 Am. St. Rep. 904, and note; *De Graff v. Queen Ins. Co.*, 38 Minn. 501; 8 Am. St. Rep. 685, and note.

**INSURANCE — PRESUMPTION OF KNOWLEDGE OF INSURER.** — The agent of an insurance company taking a risk is presumed to be familiar with the building, its description, and manner of use, and to insure it accordingly: *Pettit v. State Ins. Co.*, 41 Minn. 299. It is the duty of the insurance company, if it desired to make certain the interest of the insured, to have inquired of him and obtained representations from him: *Essex Sav. Bank v. Meriden Ins. Co.*, 57 Conn. 335.

**INSURANCE — INSURABLE INTEREST OF CARRIER.** — A carrier has such an insurable interest in the goods intrusted to it for carriage that it may insure the goods for their full value: *LANCASTER MILLS v. Merchants' etc. Co.*, 80 Tenn. 1; 24 Am. St. Rep. 586, and note; *Insurance Co. of N. A. v. Forchimer*, 88 Ala. 541.

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## CLARK v. PENNSYLVANIA RAILROAD COMPANY.

[145 PENNSYLVANIA STATE, 433.]

**RIPARIAN RIGHTS — FLOW OF STREAM.** — Every riparian owner is entitled, as an incident to his land, to the natural flow of the water of a stream running through it, undiminished in quantity, and unimpaired in quality, subject to the reasonable use of the water by those similarly situated, for the ordinary purposes of life. Any essential interference therewith, if wrongful, whether attended with actual damages or not, is actionable.

**RIPARIAN RIGHTS — USE OF WATER — DIVERSION.** — Every riparian owner has the right to use the water of a stream passing over his land for ordinary domestic purposes, even to the extent of consuming all the water of the stream, but if he materially or sensibly diminishes its quantity by diversion for manufacturing or other purpose, having no necessary relation to the use of his land, he is liable to respond in damages to the lower proprietor.

**RIPARIAN RIGHTS — DIVERSION FOR BUSINESS PURPOSES.** — The business necessities of a riparian owner, having no necessary relation to the use of his land, will not justify his diversion of the waters of a stream from its natural channel, to the prejudice of a lower proprietor, and for such diversion he is liable to an action for the excessive use of the water.

**RIPARIAN RIGHTS — DIVERSION — DAMAGES.** — A lower proprietor is entitled to recover nominal damages for the excessive diversion of the water of a

stream by an upper owner, without proof of actual injury, but to entitle him to recover special damages, they must be proved by competent evidence.

**RIPARIAN RIGHTS — DIVERSION — SPECIAL DAMAGES.** — A lower owner cannot recover special damages for the diversion of water by an upper owner, on the ground that it has interfered with his water power, when he has no means of using such power, has made no attempt to use it, and has given no notice of intention to use it.

**RIPARIAN RIGHTS — DIVERSION — SPECIAL DAMAGES — ELEMENTS AND MEASURE OF — EVIDENCE.** — In an action to recover special damages for the excessive diversion of water by an upper proprietor, the measure of damages is the injury sustained from the diversion of the water in the use of the land for the purposes for which it was used, or would have been used but for refusal on due notice to discontinue the diversion. A reduction in rental value from this cause is a proper element of damages, but the rental value of an unoccupied mill site is speculative and inadmissible, and so is the annual rental value of the land based on the sale or diversion of the water by the lower proprietor.

*Paul H. Gaither and J. A. Marchand*, for the appellant.

*D. S. Atkinson and J. M. Peoples*, for the appellees.

**CLARK, J.** The plaintiffs, Paul Clark and others, own one hundred and twenty acres of land near the western base of Laurel Hill, in Westmoreland County, along the line of the Pennsylvania railroad, and above the town of New Florence. A small stream of water ran through this land, with such a fall as to form the site for a water-power for a mill, and a grist-mill had many years ago been erected, which, by an over-shot wheel, was propelled by the water of this stream until about the year 1872, when the mill was abandoned, and has since that time been suffered to go to decay and ruin. At the institution of this suit, and for six years prior to that time, it is conceded there was no mill or other structure erected on this site, suitable for operation for any useful or profitable purpose; nor, during that period, was there any effort to operate the mill, or use the water power for any purpose whatsoever.

The Pennsylvania Railroad Company, as early as 1853, under some agreement with the widow of the plaintiffs' predecessor in title, began to divert the water of this stream through a three-inch pipe, from what is known as the Hull dam, which was on the adjoining tract above, owned by the railroad company, to its water-station at New Florence. About the year 1870 it increased the capacity of the pipe to four inches, and in 1883 to six inches. This suit was brought in 1887, not to recover for any injury to the mill, or to the operation of the mill, for within the period of the statute of limitations there

was no mill to operate, but for damages to the mill site or water-power, caused by the defendant's diversion of the water.

The rule of law is uniform and undoubted, that every riparian owner is entitled, as an incident to his land, to the natural flow of the water of a stream running through it, undiminished in quantity and unimpaired in quality, subject to the reasonable use of the water by those similarly entitled, for the ordinary purposes of life; and any sensible or essential interference therewith, if wrongful, whether attended with actual damage or not, is actionable: *Mayer v. Commissioners*, 7 Pa. St. 363; *Philadelphia v. Collins*, 68 Pa. St. 116. This principle applies to some extent, whether the stream is public or private: *Haupt's Appeal*, 125 Pa. St. 224; *Lord v. Meadville Water Co.*, 135 Pa. St. 130; 20 Am. St. Rep. 864. The size and capacity of the stream is, of course, in all cases of this kind, to be considered: *Miller v. Miller*, 9 Pa. St. 74; 59 Am. Dec. 545. "Every riparian owner," says our brother Paxson in *Pennsylvania R. R. Co. v. Miller*, 112 Pa. St. 41, "has the right to use the water of the stream passing over his land, for ordinary domestic purposes; and if the stream be so small that his cattle drink it all up, while it may be a loss to the lower riparian owner, it is *damnum absque injuria*. But where the upper riparian owner diverts or uses the water, not for ordinary domestic purposes, such as are inseparable to and necessary for the use of his land, but for manufacturing or other purposes, having no necessary relation to his use of his land, it is different"; in such case he has only the right, as against a lower proprietor, to use so much of the stream as, will not materially or sensibly diminish its quantity: *Wheatley v. Chrisman*, 24 Pa. St. 298; 64 Am. Dec. 657.

The stream in question, although steady, was small; and it is alleged that the six-inch pipe so impoverished the flow of water as to destroy its utility as a water-power. The defendant company, as a riparian owner merely, had no right to divert the water from its natural channel, to the prejudice of the rights of others below it on the stream. If the amount of water required to supply its locomotives at this point, and diverted by it from the channel of the stream, sensibly or materially diminished the flow, it was bound to buy it, or subject itself to an action for an excessive use or diversion of the water. No matter what were the necessities of the defendant's business, it had no right to convey the water out of its course,

to the prejudice of the plaintiffs' rights: *Haupt's Appeal*, 125 Pa. St. 211.

We do not understand the defendant to deny that the plaintiffs, under the proofs, are entitled to a verdict for nominal damages. The principle is well established, that a diversion of the water of a stream, even without actual injury to a lower riparian owner, legally imports damage, because it is an infringement of a right: *Angell on Watercourses*, 185. Every injury imports damage, and if no other damage be established, the party is entitled to nominal damages. "This principle, moreover, applies more strongly," says the same author, page 591, "where there is a violation of the plaintiff's right; but the defendant's act, if continued, may become the foundation, by lapse of time, of an adverse right, and hence actual, perceptible damage is not indispensable as the foundation of an action." Any trespass or nuisance which infringes upon the rights of the plaintiff, or which would abridge his present or potential use of his property, will justify an action, although it cause no present actual damage: *Gould on Waters*, 401-404, and cases there cited. There is an obvious distinction between the proper use of a stream by a riparian owner, which, although it necessarily modifies the flow, infringes no right of other proprietors, and one which infringes their rights, although it may cause no damage: *Miller v. Miller*, 9 Pa. St. 74; 59 Am. Dec. 545; *Delaware etc. Canal Co. v. Torrey*, 88 Pa. St. 148; *Graver v. Sholl*, 42 Pa. St. 58.

But what evidence was there to justify a recovery of special damages? The plaintiffs, as we have said, had no mill or other means of using or applying the water-power. They had an abundance of water in the stream for all the purposes to which they applied it, or sought to apply it; and it is difficult, in this view of the case, to see how they could have suffered any special damage. If they had it in contemplation to erect a mill, they could have vindicated their right by successive actions of trespass; or after establishing their right at law, if it were at all disputed, they might have enjoined its invasion by proceedings in equity. They might perhaps have laid grounds for special damages, by giving notice of their purpose to avail themselves of the water-power.

The plaintiffs' theory as to special damages goes upon the apparent assumption that the defendant has appropriated something which was theirs, and for which he should pay the price. But the plaintiffs did not own the water which ran

through the defendant's pipe; indeed, it was diverted from its course before it reached the plaintiffs' land, and the plaintiffs could in no sense be said to have any title to the water. As riparian owners they had the right, as we have said, to have the water of this stream run through their land in its natural channel, without any material impairment of its flow. They had a right to the use of the stream as an incident to the land for ordinary purposes, and also for any extraordinary purpose to which they might choose to apply it, provided such extraordinary use did not materially diminish its quantity or impair its quality. They might have chosen to erect a mill or to lease the site to some other person to erect a mill; and in either case, upon notice from the plaintiffs, the railroad company would have been obliged to cease the diversion of the water or be subject to a claim for special damage; but as long as the diversion of the water did not do them any actual injury, they had no claim for special damages. The company was, of course, at all times liable to an action in vindication of the plaintiffs' right, but not for the recovery of actual damage until an actual injury was done. The mill site was of no use to the plaintiffs or to a lessee, or to any other person in the absence of a mill, or other useful mechanical construction to which the water might be applied; and until such a structure was erected, or proposed to be erected, how could the diversion of the water cause actual injury? Had the diversion ceased, and the full flow of the water been restored, how could that have profited the plaintiffs? They had no means of utilizing the water, and therefore they suffered no actual loss from its diversion. If the plaintiffs had owned the water, they would be entitled to recover its value, but they were only entitled to the use of it as it passed through their property.

It is said that they might have leased or rented the water-power, and the rental value is therefore the proper measure of damages; but the use of the mill site, either by the owners or a tenant or lessee of the plaintiffs, is dependent wholly upon the construction of a mill, and it is extremely improbable that a lessee would undertake the expenditure upon a mere tenancy from year to year. The estimated annual value of the mill site as such, and independent of the land, is fanciful, conjectural, and speculative, for it is based upon its value as applied to some sort of a mill. It was variously spoken of by the witnesses as a suitable site for a grist-mill, or a saw-mill, for a cash and door factory, for a coach or wagon factory, or for

a woolen factory; but all these suggestions of annual rental value are made upon the assumption that a mill, factory, or other structure would be built in order to utilize the advantages which the site offers. The true rule in such a case is to estimate the damages sustained from the diversion of the water, in the use of the land for the purposes for which for the time the land was used, or for which it would have been used but for the refusal of the defendant on due notice to remove the pipe. The injury received, if any, was not to the mill site, for there was no mill, and the site was useless without a mill. It was to the tract as a whole. It was competent, therefore, for the plaintiffs to introduce evidence to show any actual injury they suffered, within the period of the statute, in the enjoyment of their land from the diversion of the water; and as a means of computation, they might show that the annual rental value of the land was from this cause reduced, but the annual rental value of the mill site is necessarily speculative, and therefore inadmissible. Nor was it competent to admit any estimate of annual rental value made upon the basis of a sale or diversion of the water, for the water does not belong to the plaintiffs. As riparian owners, they were entitled merely to the use of it as it passed through their property.

The judgment is reversed, and a *venire facias de novo* awarded.

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**WATERCOURSES — RIPARIAN RIGHTS.** — Every riparian owner has an equal right to have the stream flow through his lands without material diminution in quantity, subject to the limitation that each proprietor is entitled to a reasonable use of the water for domestic, agricultural, or manufacturing purposes: *Ulbricht v. Bufala Water Co.*, 86 Ala. 587; 11 Am. St. Rep. 72, and note; *Koopman v. Blodgett*, 70 Mich. 610; 14 Am. St. Rep. 527, and note; *Hanford v. St. Paul etc. R. R. Co.*, 43 Minn. 104.

**WATERCOURSES — RIPARIAN RIGHTS.** — The owner of land situated upon a stream of water accustomed to flow through the lands of others cannot divert the water to supply the inhabitants of a city: *Lord v. Meadville Water Co.*, 135 Pa. St. 122; 20 Am. St. Rep. 864, and note. A riparian proprietor cannot authorize a corporation to take water from a stream and conduct it to a distance and sell it, as against a lower proprietor: *Heilbron v. Fowler etc. Canal Co.*, 75 Cal. 426; 7 Am. St. Rep. 183, and note; note to *Jones v. Adams*, 3 Am. St. Rep. 797. The use made by mill-owners of the waters of a stream must be reasonable: *Mason v. Hoyle*, 56 Conn. 255.

**WATERCOURSES — DIVERSION — DAMAGES.** — The diversion of water from the natural channel of a stream by a riparian owner to supply a town is a wrongful act, for which an action will lie by a lower owner, but he is entitled to recover only nominal damage without affirmative proof that he suffered special damage: *Ulbricht v. Bufala Water Co.*, 86 Ala. 587; 11 Am. St. Rep. 72, and note.



**KELSO v. REID.**

[145 PENNSYLVANIA STATE, 602.]

**DAMAGES, LIQUIDATED.** — Where one violates his contract by which he sells his business and its good-will, and stipulates as part of the transaction not to carry on the same business within a given territory, or to forfeit a certain sum as liquidated damages, he is liable for the amount named in the contract unless it is excessive and unreasonable.

**DAMAGES FOR BREACH OF CONTRACT — PENALTY — EVIDENCE.** — In an action for breach of contract not to carry on a given business within a certain territory, or to forfeit a certain sum, evidence of the injury actually sustained by the breach is inadmissible, if the damages as liquidated in the contract are reasonable.

**ASSUMPT** to recover for a breach of contract by which defendant sold plaintiffs a merchandise store, and stipulated that he would not carry on the same kind of business within a radius of two miles, under a penalty of one thousand dollars, to be paid as liquidated damages, without proof of loss or damage by plaintiffs. On the trial defendant offered to prove that plaintiffs had sustained no damage from the breach of the contract between them. This offer was excluded, and defendant excepted and appealed.

*John M. Buchanan*, for the appellant.

*J. H. Cunningham, L. E. Grim, and D. S. Naugle*, for the appellees.

**PER CURIAM.** The learned judge below was clearly right in excluding the testimony referred to in the first specification. The parties having by their agreement liquidated the damages for its breach, any inquiry as to the extent of the injury sustained by the plaintiffs by the starting of defendant's store was irrelevant. This belongs to a class of cases where it is next to impossible to prove the full extent of the damages; and it was for this reason, in part at least, that the damages were liquidated by the parties themselves. Moreover, the amount was reasonable. It is just as well that persons who sell out their business with its good-will, and stipulate as a part of the transaction not to carry on the same business within a given circuit, should understand that it means something, and that for a breach of such covenant they must respond in damages. The court below was right in holding that the penalty was not so excessive as to affect the issue.

The defendant's first, second, and fourth points were properly refused. The portions of the charge embraced in the fifth,

sixth, seventh, and eighth specifications are entirely free from error.

Judgment affirmed.

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**LIQUIDATED DAMAGES.** — In ascertaining whether a sum stipulated as payable for breach of a contract is a penalty or liquidated damages, the rule is, that if the damages resulting from the breach can be definitely computed, the stipulated sum must be construed as a penalty; but where such damages are not susceptible of admeasurement by a pecuniary standard, then the sum stipulated must be regarded as liquidated damages: *Brennan v. Clark*, 29 Neb. 335; *Wilhelm v. Baves*, 21 Or. 194; *Ondon v. Kemper*, 47 Kan. 126; *Nis v. Draughan*, 54 Ark. 340; *Pacific F. Co. v. Adler*, 90 Cal. 110; 25 Am. St. Rep. 102, and note; *Tode v. Gross*, 127 N. Y. 480; 24 Am. St. Rep. 475, and note; *Drew v. Pedlar*, 87 Cal. 443; 22 Am. St. Rep. 257.

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## **LENTZ v. CARNEGIE BROTHERS AND COMPANY.**

[145 PENNSYLVANIA STATE, 612.]

**RIPARIAN RIGHTS — POLLUTION OF STREAM.** — A manufacturer of coke from coal not mined on his own land is liable in actual damages to a lower proprietor for the pollution of a stream as a necessary incident to his business.

**RIPARIAN RIGHTS — POLLUTION OF STREAM — MEASURE OF DAMAGES.** — In an action to recover damages against an upper proprietor for the unlawful pollution of a stream, the lower proprietor is entitled to recover only such actual damages as he has sustained within the period of the statute of limitations preceeding the action. Injury sustained prior to that time is not a proper element of damages.

**TRESPASS — MEASURE OF DAMAGES.** — In an action for injurious trespass to land, the measure of damages is the cost of restoring the land injured within the period of the statute of limitations to its former condition, and if the cost of restoration will equal or exceed the value of the land injured, then its value is the measure of damages. The rule as to damages for a taking by eminent domain is not applicable in such case.

**WITNESSES — CROSS-EXAMINATION — KNOWLEDGE AND CREDIBILITY.** — A witness who has placed a value upon the property in dispute may be asked, upon cross-examination, for the purpose of testing his fairness, knowledge, and credibility, if he does not know of sales of similar property in the same vicinity at a much less price than that named by him.

*John F. Wentling, Paul H. Gaither, J. A. Marchand, and David A. Miller, for the appellants.*

*E. E. Robbins, D. S. Atkinson, John M. Peoples, and John E. Kunkle, for the appellee.*

**WILLIAMS, J.** The questions raised by this appeal are substantially those which were considered and decided in the recent case of *Robb v. Carnegie*, 145 Pa. St. 324, *ante*, p. 694,

in which an opinion was filed on the first day of the present term. The conclusions reached in that case require us to sustain the second, fifth, sixth, eighth, and fourteenth assignments of error, all of which relate to the measure of damages.

The plaintiff is the owner of a farm containing seventy-three acres, and lying on both sides of Brush Creek. It is mainly upland. The flat along the stream is quite narrow, and covers not more than seven or eight acres, including the bed of the stream. The defendants own and operate an extensive coke-works, situated on the bank of the stream a little more than one mile above the plaintiff's farm, at which the slack is collected from several coal-mines in the region, and used for making coke. The plaintiff alleges that the defendants habitually put the ashes from their ovens and their refuse slate and slack into the stream, using it as a dumping-ground, and depending on the current and the floods to carry it away. By this means the water is polluted, and rendered unfit for use, the channel is choked up, the water is crowded out of its original bed, and the flat cut up and covered with a deposit of ashes, slate, and refuse from the coke-works, so that it is unfit for cultivation. For the injury thus sustained, as the result of the unlawful use made of the stream by the defendants, the plaintiff seeks to recover in this action. The defendants reply that the pollution of the stream began before their works were erected, as the result of mining operations on Brush Creek and its tributaries, which were in progress more than twenty years before this suit was brought. They say that their own works were erected in 1871, and have been in operation since that time without objection or complaint until now; that the condition of the stream and the plaintiff's land has undergone no material change for many years, and if their present condition is to any extent chargeable to the acts of defendants or their employees, no recovery can be had in this case except for injury done within six years before suit was brought.

The questions thus presented to the jury were, in the first place: What was the condition of the stream and the plaintiff's flat land six years before the writ was issued? Was the water then polluted? Was the channel choked with refuse, and the flat cut by the water, and covered with the deposit complained of? Having ascertained what the situation then was, they were next to inquire whether the situation had been made worse during the six years. If so, in what respect, and to what extent? In this way they would be able to reach a

correct conclusion as to the extent of the injury done the plaintiff, for which he could recover in this action. The method adopted on the trial was quite different. The plaintiff was permitted to show, and the jury was instructed to consider, what the plaintiff's farm would be worth as a whole, including the buildings and improvements, with the creek and the flat land in the original condition as it was before the work of pollution began, and what it was now worth with the stream and the flat in their present condition; so that the difference between these estimates became the measure of damages.

We held in *Robb v. Carnegie*, 145 Pa. St. 324, *ante*, p. 694, that this mode of estimating damages, which is properly applicable to cases where an entry is made under the power of eminent domain, is not ordinarily applicable to actions of trespass. It is not necessary to repeat the reasons which were given in support of that conclusion. It is enough to say that we adhere to them. In case of a taking, the natural inquiry is, How is that which is left affected by the taking? Where nothing is taken, but an injurious trespass is alleged, the question is, What will be the cost of restoring the thing injured to its former condition? If the cost of restoration will equal or exceed the value of the thing injured, then the value becomes the measure of the plaintiff's damages. But there is still another reason why the measure of damages adopted in the court below was inapplicable to this case. The defendants had pleaded the statute of limitations, and the inquiry was thereby limited to six years. The comparison which the testimony placed before the jury carried them back to a time when the stream was not polluted, and the slate and slack had not been deposited on the plaintiff's land. It brought to their notice, not the injury done in six years, but the changes made from the beginning of operations on Brush Creek, which was nearly or quite a quarter of a century before the trial. While the learned judge told the jury that the plaintiff could not recover for an injury sustained more than six years before his action was begun, he permitted testimony to be given which brought the entire change in the situation of the plaintiff's flat land to their attention, and which contrasted its value if in its original condition with its value in its present condition. This evidence was admitted after objection, and for the purpose of providing the jury with a measure of damages in this case.

The seventh assignment of error is also sustained. The witness had put a value upon the plaintiff's farm. The defendants had a right to test his knowledge, and his fairness as a witness, upon cross-examination. For this purpose it was proper to ask him if he did not know of sales of farm lands in the same vicinity at a much less price than he had put upon the farm of the plaintiff. If he did know of such sales, but disregarded them in fixing the price of the plaintiff's land, that circumstance was calculated to affect his credibility, unless it was explained to the satisfaction of the jury.

The judgment is reversed, and a *venire facias de novo* is awarded.

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**WATERCOURSES — RIPARIAN RIGHTS — DAMAGES FOR POLLUTION OF STREAM.** — Where an upper owner on a stream so pollutes it as to make it unfit for use by the stock of a lower owner, and a source of discomfort and sickness to his family, he is entitled to recover not only for the depreciation in the rental value of the premises caused thereby, but also such other damage as he may have sustained through sickness and discomfort: *Ferguson v. Firmenich Mfg. Co.*, 77 Iowa, 576; 14 Am. St. Rep. 319. A case in which the points decided in this case are discussed is *Robb v. Carnegie*, 145 Pa. St. 324, ante, p. 694, and note. The defendants opened a colliery upon a stream some distance above the plaintiff, and corrupted the water and spoiled it for plaintiff's use to such an extent that he had to abandon the use of the water. It was held that plaintiff could recover therefor: *Sanderson v. Pennsylvania Coal Co.*, 86 Pa. St. 401; 27 Am. Rep. 711, and note.

**TRESPASS UPON LAND — MEASURE OF DAMAGES.** — The measure of damages for a trespass upon land is the cost of restoring the premises to such a condition of utility and safety as it was before the commission of the trespass: *Larson v. O. R. & N. Co.*, 19 Or. 241; and substantially to the same effect is *Stebert v. Nye*, 42 Minn. 541.

**WITNESSES — CROSS-EXAMINATION.** — Questions may be asked upon cross-examination to test the accuracy or veracity of a witness: *Stevens v. Beach*, 12 Vt. 535; 26 Am. Dec. 359; note to *Hutchins v. Moore*, 14 Am. St. Rep. 499.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**RHODE ISLAND.**

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**ADAMS v. BAKER.**

[16 RHODE ISLAND, 1.]

**LOST NOTE — ACTION AT LAW MAINTAINABLE UPON, WHEN. —** An action at law lies upon a promissory note indorsed to the plaintiff before maturity, and by him lost after its maturity, and all that the plaintiff in such action is required to show to entitle him to a recovery is, that the defendant can pay the note without the hazard of being required to pay it a second time.

**ASSUMPSIT.**

*Rollin Mathewson*, for the plaintiff.

*Warren R. Perce*, for the defendant.

**DURFEE, C. J.** This case comes before us on demurrer to the second count of the declaration, which count sets forth that the defendant's intestate, at Providence, on July 23, 1857, made his promissory note for five hundred dollars payable to James A. Requa or order two months after date, and that said Requa then and there indorsed and delivered it to the plaintiff; that it was not paid at maturity; that after maturity, and before any part of it was paid, it was lost by the plaintiff; that after the loss the plaintiff demanded payment of the defendant, and the defendant refused payment. The ground of demurrer is, that an action at law will not lie on such a note so indorsed and lost, the only remedy being in equity.

There is a conflict of decision on the question. The English doctrine is, that the only remedy on a lost negotiable note or bill is in equity, the reason alleged being that the maker, upon paying the note, is entitled to have it surrendered to him for

his protection against suit thereon by any other person coming into possession of it, and a court of equity can afford protection by exacting an indemnity bond, whereas a court of law cannot. In this country, the English doctrine has been adopted in several states, but in others it has been materially modified or rejected. In this state, in *Aborn v. Bosworth*, 1 R. I. 401, which was an action on a bill of exchange lost before maturity, tried to the jury in 1850, this court instructed the jury that the payee was entitled to recover upon proof either that the bill was destroyed or unindorsed, or so indorsed that no third person could recover on it. The counsel for the defendant disparages the authority of this case because it was determined at *nisi prius*; but it should be remembered that at the time it was tried, the full court were required to sit in the trial of cases to the jury, and the court, when so sitting, was accustomed to listen to very thorough discussions of legal questions on both principle and precedent. We think the case has been, and should continue to be, accepted as settling the law, so far it goes, for this state. The ground of decision was, that the loser is entitled to recover in an action against the maker, whenever the recovery would put the maker in no worse position than he would have been in if the loss had not occurred.

The averment here is, that the note was lost after indorsement, but also after maturity. The averment of loss was not necessary to the maintenance of the action, and in our opinion, it is competent for the plaintiff to prove not only the loss but also the destruction of the note: 2 Parsons on Notes and Bills, 309. In *Peabody v. Denton*, 2 Gall. 351, the note was lost after maturity, and in an action thereon by the indorsee against the maker, tried eighteen years after the loss, the court held that after so great a lapse of time it was incumbent on the defendant to show either that the note existed or had been demanded of him, or that it must otherwise be presumed that no demand would ever be made. In the case at bar, for anything that is averred, the note may have been lost thirty years ago. In *Swift v. Stevens*, 8 Conn. 431, the note disappeared some six years before the trial. The cashier of a bank to whom it had been delivered for safe-keeping testified that he had made diligent search for it, but was unable to find it; that he had never delivered it to any person, and that he verily believed it had been accidentally destroyed; and on motion for new trial after verdict for the plaintiff, the court



held that the evidence was proper to go to the jury to prove the destruction or non-existence of the note. The circumstances in the case at bar, for anything that appears, may be equally or more cogent to prove the destruction or non-existence of the note.

Moreover, all that is required to entitle the plaintiff to recover is proof that the defendant can pay the note without the hazard of being required to pay it a second time. Accordingly, it has been held that the loser is entitled to recover when any future action on the note will be barred by the statute of limitations: *Torrey v. Foss*, 40 Me. 74; *Moore v. Fall*, 42 Me. 450; 66 Am. Dec. 297. Any future action on this note would be barred, so far as appears, and if so the defendant will be protected. And furthermore, the action here is not against the maker personally, but against his administrator, and it has been stated that the maker's estate was represented insolvent, that commissioners were appointed, who allowed the plaintiff's claim, and that the allowance was stricken out by the defendant, and this action brought under the Public Statutes of Rhode Island, chapter 186, section 15. If this be so, the estate, if really insolvent, will be protected without any indemnity bond, since no creditor who has not presented his claim to the commissioners can maintain any action upon it against the estate unless there is a surplus remaining after all the debts allowed have been paid. We think, therefore, that the demurrer must be overruled, since it does not appear but that the plaintiff is able to show that the defendant can pay the note to him without risk of being obliged to pay it again to any other person.

The plaintiff contends that he is entitled to recover because, though the note was lost after indorsement, it was overdue when lost, and therefore any person taking it would take it subject to the equities, and could get no better title than the person had from whom he took it. A number of cases support this view: *Thayer v. King*, 15 Ohio, 242; 45 Am. Dec. 571; *Sloo v. Roberts*, 7 Ind. 128; *Elliott v. Woodward*, 18 Ind. 183; *Smith v. Walker*, Smedes & M. Ch. 432, 435; *Chaudron v. Hunt*, 3 Stew. 81; 20 Am. Dec. 60; *Fales v. Russell*, 16 Pick. 815, 817; *Renner v. Bank of Columbia*, 9 Wheat. 581. But against this view it is urged that the holder of the note by simply producing it and verifying the signature makes a *prima facie* case for himself, throwing on the defendant the burden of proving that the note was lost before maturity,—a burden involving a risk which he ought not to be exposed to:

2 Parsons on Notes and Bills, 295. We do not find it necessary to decide the point now, and therefore leave it undetermined.

Demurrer overruled.

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THE OWNER OF A LOST NOTE MAY RECOVER THEREON in an action at law, whenever the maker is protected against a double payment: *Thayer v. King*, 15 Ohio, 242; 45 Am. Dec. 571; for example, where the note is payable to order, but has not been negotiated: *Clark v. Snow*, 60 Vt. 205; 6 Am. St. Rep. 108; or where it is non-negotiable: *Moore v. Fall*, 42 Me. 450; 66 Am. Dec. 297; or, as in the principal case, where it is overdue when lost. Under such circumstances, the instrument is charged with all the equities existing between the owner and the maker, and the holder takes it subject to those equities: *Citizens' National Bank v. Brown*, 45 Ohio St. 39; 4 Am. St. Rep. 526. So also, the maker may be compelled to pay without receiving an indemnity, if it appears that the statute of limitations may be interposed to bar the claim of a bona fide holder: *Moore v. Fall*, 42 Me. 450; 66 Am. Dec. 297. On the other hand, whenever the maker cannot set up an equitable or other valid defense against a bona fide holder, indemnity must be given. Formerly, the only remedy in such cases was in chancery: *Fells Point Savings Institution v. Woodson*, 18 Md. 330; 81 Am. Dec. 603. But in most states provision is now made for tendering an indemnity bond at the commencement of an action at law.

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## LEWIS v. TOWN OF NORTH KINGSTOWN.

[16 RHODE ISLAND, 18.]

**INJUNCTION AGAINST THREATENED TRESPASS, WHEN GRANTED.** — Although, in case of threatened trespasses, courts of equity generally leave the suffering party to his remedy at law, yet when such party is in possession, and the trespass, if permitted, will result in irreparable injury, or tend to the destruction of the estate, the courts will interpose by injunction. Where, therefore, a bill avers that at the time of its filing the defendants are purposing, not only to remove a building from a lot belonging to the complainants, thus destroying a portion of their estate, but also to grade the lot, thus obliterating its boundaries, and throwing it open to use as a part of the highway, so that the complainants, in order to reach a complete remedy, may not only have to prosecute the defendants for their damages, but also to establish their right as against the public, such bill states a case that falls within the class of cases in which threatened trespasses are enjoined.

**DOING, PENDENTE LITE, ACTS SOUGHT TO BE ENJOINED NOT GROUND FOR DISMISSING INJUNCTION BILL.** — A defendant in an injunction bill cannot oust the court of its jurisdiction by committing, *pendente lite*, the very acts to prevent which the suit was begun. And where a defendant in such a suit sets forth in his answer that he has, *pendente lite*, performed the acts sought to be enjoined, and avers that the complainant's remedy at law is complete, the court will not, on his motion, dismiss the bill, but will retain it for the purpose of affording relief to the complainant by determining the amount of compensation to be awarded to him, al-

though the nature and measure of such compensation are precisely the same as he would otherwise recover as damages in an action at law. And if it be necessary for the complainant to amend his bill, he should be allowed to do so.

**BILL** in equity for an injunction.

*Samuel W. K. Allen*, for the complainants.

*William C. Baker*, for the respondents.

**DURFEE, C. J.** The bill sets out that the complainants are owners in possession of a lot of land situate on Washington Street in the village of Wickford, in the town of North Kingstown, in highway district No. 37 of said town, on which lot there is a building belonging to them; that the defendant, John H. Weeden, the surveyor of highways of said district, acting under order of the town council of said town, the members whereof are likewise made defendants, has entered on said lot, and is engaged in razing said building and taking away the foundations, for the purpose of removing said building and foundations and grading said lot, thereby throwing the estate open to the public and obliterating its boundaries, to the irreparable injury of the complainants. The bill prays that the defendants may be enjoined from carrying out their purposes, and from further interfering in any way with the estate, and for general relief. The bill was filed February 28, 1885. The defendants, by their answer filed May 27, 1885, admit that they are or were doing as charged, but deny that the lot is part and parcel of the estate of the complainants, and allege that it is and ever has been, from a time when the memory of man runneth not to the contrary, part and parcel of a public highway, and that the building had stood thereon by sufferance of the town. The defendants, also, by supplemental answer filed September 28, 1886, allege that their purposes have been fully carried out by removing the building and foundations and grading the lot, and set up that the complainants ought not to maintain their bill, because their remedy is complete at law. To both answers the complainants have filed general replications.

In this state of the pleadings, the defendants move that the bill be dismissed because the complainants have an adequate remedy at law, and in support of their motion contend: 1. That the bill does not state a case for equitable relief; and 2. If it does, that the case stated has ceased to exist, by reason

of the removal of the building and foundations, and the grading of the lot.

It is true that in case of threatened trespasses, courts of equity generally leave the suffering party to his remedy at law; but when such party is in possession, and the trespass, if permitted, would result in irreparable injury, or tend to the destruction of the estate, the courts interpose by injunction. In the case at bar, the bill averred that the defendants were purposing, when the bill was filed, not only to remove the building from the lot belonging to the complainants, thus destroying a portion of their estate, but also to grade the lot, thus obliterating its boundaries and throwing it open to use as a part of the highway, so that, in order to reach a complete remedy, the complainants might not only have to prosecute the defendants for their damages, but also to establish their right as against the public. We think the case as stated in the bill falls within the class of cases in which threatened trespasses are enjoined: *Winslow v. Nayson*, 113 Mass. 411, 421; *Fox v. Fitzsimmons*, 29 Hun, 574, 579; *McPike v. West*, 71 Mo. 199; *Erwin v. Fulk*, 94 Ind. 235; *Gilbert v. Arnold*, 30 Md. 29; Kerr on Injunctions, 295.

We do not think the motion should be granted because of the statements of the supplemental answer, since those statements are controverted by the replication. Moreover, if they were admitted, we do not think they would make a case for dismissal. It ought not to be in the power of a defendant in an injunction bill to oust the court of its jurisdiction by committing, *pendente lite*, the very acts to prevent which the suit was begun, and such, we think, is the law. "It is well settled," says the supreme judicial court of Massachusetts, "with little or no conflict of authority, that when a defendant in a bill in equity disenables himself, pending the suit, to comply with an order for specific relief, the court will proceed to afford relief by way of compelling compensation to be made, and for this purpose will retain the bill and determine the amount of such compensation, although its nature and measure are precisely the same as the party would otherwise recover as damages in an action at law": See *Milkman v. Ordway*, 106 Mass. 232, a case which contains a very full citation and discussion of authorities, and goes even beyond the passage quoted. See also Story's Eq. Jur., 12th ed., secs. 794, 799. It may be that an amendment of the bill, setting forth the acts committed by the defendants *pendente lite*, will be necessary,

notwithstanding the supplemental answer, if the complainants desire not only an injunction from further interference, but also an award of damages, but if so the complainants should have an opportunity to make it.

Motion dismissed.

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**EQUITY WILL NOT INTERFERE** where there is an adequate and complete remedy at law: *Fitzmaurice v. Mosier*, 116 Ind. 363; 9 Am. St. Rep. 854; *McMillen v. Mason*, 71 Wis. 405; *Bodman v. Drainage District*, 132 Ill. 439. Therefore an injunction will not issue to restrain a mere trespass of ordinary character, either upon person or property: *Port of Mobile v. Louisville etc. R. R. Co.*, 84 Ala. 115; 5 Am. St. Rep. 342. But where the injury will be irreparable, relief is always granted. Numerous cases illustrating this doctrine, and explaining the meaning of "irreparable injury" in the law of injunction, are cited in the notes to *Jerome v. Ross*, 11 Am. Dec. 500; *Dudley v. Hurst*, 1 Am. St. Rep. 375-378. In *Delaware etc. R. R. Co. v. Central Stock Yard Co.*, 45 N. J. Eq. 50, it was held that where the only ground laid to support the jurisdiction of a court of equity is that the defendant is violating a legal right of the complainant, to his irreparable injury, the complainant, to be entitled to the aid of the court, must show that his adversary's conduct is unconscientious; but this qualification of the general rule appears to be expressed too broadly.

**ONE OF THE CASES IN WHICH AN INJURY IS IRREPARABLE** in the equitable sense is where the complainant cannot procure redress at law without incurring the expense of several actions, and the damages recoverable would be inadequate to recompense him: *Lembeck v. Nye*, 47 Ohio St. 336; 21 Am. St. Rep. 828. Thus relief is frequently granted where the trespasser is an irresponsible or insolvent person: *Wilson v. Hill*, 46 N. J. Eq. 367; *Sullivan v. Rabb*, 86 Ala. 433.

**AN INJUNCTION WILL NOT ISSUE** if the injury is doubtful, eventual, or contingent: *Shivery v. Streeper*, 24 Fla. 104; *Ruge v. Oyster Co.*, 25 Fla. 657; nor unless the complainant's legal rights are clear: *Delaware etc. R. R. Co. v. Central Stock Yard Co.*, 45 N. J. Eq. 50; *Hagarty v. Lee*, 45 N. J. Eq. 255.

**THE RULE THAT ONLY IRREPARABLE INJURY** may be enjoined has no application to acts, especially corporate acts, entirely without authority: *Groff's Appeal*, 128 Pa. St. 621.

**THE FACTS ON WHICH AN ALLEGATION OF IRREPARABLE INJURY** is based must be set forth; a general allegation is not sufficient: *Watson v. Ferrell*, 34 W. Va. 406.

**EQUITY HAVING TAKEN JURISDICTION FOR ONE PURPOSE** will retain it for others necessary to the final settlement of the suit: *Allen v. Elder*, 76 Ga. 674; 2 Am. St. Rep. 63; *Chickering v. Brooks*, 61 Vt. 555; *Alf's Appeal*, 129 Pa. St. 49; *Orump v. Ingersoll*, 47 Minn. 179; even though, in giving such relief, it may be called on to administer remedies which properly pertain to courts of common law: *Miller v. Louisville etc. R. R. Co.*, 83 Ala. 274; 3 Am. St. Rep. 722; as, for example, to ascertain and compel the payment of damages already sustained from the injury enjoined: *Whipple v. Fairhaven*, 63 Vt. 221.

**MOULTON v. SMITH.**

[16 RHODE ISLAND, 126.]

**ESTATE OF DECEASED WIFE CHARGEABLE WITH EXPENSES OF ADMINISTRATION THEREON BY HUSBAND.** — A husband who administers upon the estate of his deceased wife is entitled to retain therefrom the funeral and probate expenses paid by him, together with a reasonable compensation for his services as administrator.

**PHYSICIAN'S BILL FOR WIFE NOT CHARGEABLE AGAINST HER ESTATE.** — A bill for services rendered by a physician to a married woman in her last sickness is the personal debt of her husband, and where, after her death, he administers upon her estate, he is not entitled to charge it with the amount of such bill.

**GRAVE-STONE PROPERLY REGARDED AS PART OF FUNERAL EXPENSES, WHEN.**

A grave-stone, if simple and inexpensive, may be properly regarded as part of the funeral expenses, when the estate of the deceased is solvent.

**LIEN ON WIFE'S ESTATE FOR EXPENSES OF ADMINISTRATION ENFORCED IN EQUITY, WHEN.** — Where a husband who, as administrator of the estate

of his deceased wife, has the right to retain out of her estate the amount necessary to reimburse him for the funeral and probate expenses paid by him, and to compensate himself for his services as administrator, dies before settling his account with the probate court, his administrator may, by bill in equity against her administrator, establish a lien on her estate for such expenses and compensation; and such suit is not barred by the delay of the husband for more than two years after the death of his wife to render his account as administrator, nor by the omission of his administrator to have his intestate's account settled in the probate court before filing his bill in equity.

**BILL** in equity to establish a lien.

*Joseph O. Ely*, for the complainant.

*Benjamin M. Bosworth*, for the respondent.

DURFEE, C. J. Phebe A., wife of Charles H. West, died February 25, 1884, leaving a will, by which she gave her whole estate, real and personal, to her husband for life, and after him to her brother and nieces. The will was duly proved, and West was appointed administrator with the will annexed. He filed an inventory, from which it appears that the personal estate left by his wife amounted to \$1,021.52, and consisted of bank stock valued at \$535, a savings bank deposit of \$100, and \$193.20 in cash, besides household furniture. He paid \$248.60 for funeral expenses, and \$20.45 for probate charges. He also paid ninety-five dollars to the physician who attended his wife in her last sickness. He employed a stone-cutter to set up a marker at her grave, and to cut an inscription for her on his monument, who has rendered a bill of forty-two dollars, which has not been paid. The bills rendered all make the

charges, not against West individually, but against the estate. West died February 2, 1887, before rendering any account as administrator to the probate court, though, according to the evidence, he intended to do so. The complainant was appointed administrator on his estate. The defendant was appointed administrator *de bonis non* on his wife's estate.

The object of this suit is to have the court declare a lien on the stock and deposit for the amounts aforesaid, in favor of the complainant as administrator on West's estate, and compensation for West's services as administrator on his wife's estate, and to have so much of said stock and deposit as is necessary sold for the payment thereof.

It is provided in the Public Statutes of Rhode Island, chapter 189, sec. 1, that "the estate of every deceased person shall be chargeable with the expenses of administering the same, and the funeral charges of the deceased, and the payment of his just debts, and the same shall be paid by the executor or administrator of the estate out of the same, so far as the same shall be sufficient therefor." In *Buxton v. Barrett*, 14 R. I. 40, this court held that the estate of a woman dying under coverture is chargeable by force of this provision for her funeral expenses, and if so, it is likewise chargeable for the expenses of administering it. We see no reason, therefore, why the sums paid by Charles H. West for funeral and probate expenses, together with a reasonable compensation for his services as administrator, should not be paid out of his wife's estate. That he was her husband is not, in our opinion, enough to relieve her estate; for there is no reason why he should not have had the same right as any other administrator with the will annexed, if he wished, and the fact that he had the charges made against the estate in the receipts which he took shows that he did wish it.

The physician's bill and the stone-cutter's bill stand differently. There is nothing in the statute to make the estate chargeable with the physician's bill, unless it can be regarded as a debt due from the testatrix, but we do not see how it can, since, being covert, she was unable to contract such a debt. We think it is to be regarded as the personal debt of her husband, and that, having paid it, he was not entitled to charge it to the estate. In regard to the stone-cutter's bill, it seems to us that, where the estate is solvent, some simple and inexpensive stone or tablet to mark the grave is demanded by the decencies of Christian burial, and may be properly regarded



as a part of the funeral expenses. The statute (Pub. Stats. R. I., c. 189, sec. 4) which allows the erection of a suitable monument, "with the permission of the court of probate," in our opinion, contemplates something more pretentious. But in this case, the bill never having been paid by West, his administrator has nothing to do with it.

The complainant, therefore, can only have relief, if at all, in the matter of funeral and probate charges and compensation. The defendant contends that he is not entitled to relief in equity, but that the proper course for him is to settle his intestate's account as administrator with the probate court, and then, if he makes out his claims, to prosecute his remedy at law. This view is supported by *Munroe v. Holmes*, 9 Allen, 244; 13 Allen, 109; *Prentice v. Dehon*, 10 Allen, 353; the remedy at law, according to these cases, being, after settlement in the probate court, a suit on the second administrator's bond. That an administrator of an administrator may settle his intestate's account with the probate court is maintained in several American cases on English authority: *Nowell v. Nowell*, 2 Me. 75; *Hamaker's Estate*, 5 Watts, 204; *Ray v. Doughty*, 4 Blackf. 115; *Jones v. Irvine's Ex'rs*, 23 Miss. 361; *Steen v. Steen*, 25 Miss. 513; *Jarnigan v. Frank*, 59 Miss. 393. No exception can be taken to this doctrine when the terms in which probate jurisdiction is conferred are such as warrant its application; but of course in this country the probate courts have only the jurisdiction given them by statute, and it does not follow that they have a power simply because such a power is exercised by the English probate or ecclesiastical courts. In California it has been held that the courts of probate of that state have no power under the statute to settle the account of a deceased administrator presented by his administrator: *Wetzler v. Fitch*, 52 Cal. 638; *Bush v. Lindsey*, 44 Cal. 121; but that the representative of the deceased executor or administrator can be compelled to account in equity: *Chaquette v. Ortet*, 60 Cal. 594; *Curtiss v. Curtiss*, 65 Cal. 572. And to a like effect, see *In re Ranney*, 66 How. Pr. 291, in New York; and *Schenck v. Executors of Schenck*, 8 N. J. L. 149, in New Jersey. In this state the jurisdiction is nowhere specifically granted, but if it exist, exists under Public Statute of Rhode Island, chapter 179, section 9, which provides that the probate courts "may and shall examine, allow, and settle the accounts of executors, administrators, and guardians by them appointed." The provision may, perhaps, be broad enough to authorize the settle-

ment of the accounts of deceased executors, administrators, and guardians, when voluntarily presented by their representatives, though we know of no process by which their representatives could be compelled to account in the probate courts. But if this be so, does it follow that the complainant can have no relief in equity? The Massachusetts cases above cited are not conclusive on this point; for the equity jurisdiction in that state is limited, or was limited when those cases were decided, many controversies of equitable cognizance being thus excluded when there was another remedy either at common law or by statute: Pomeroy's Eq. Jur., sec. 313. This court has full chancery jurisdiction conferred upon it by statute, and therefore a statute which simply affords a remedy in some other tribunal or tribunals does not oust it of its chancery jurisdiction to that extent, the remedy so afforded being concurrent or cumulative. And see Pomeroy's Eq. Jur., secs. 279, 1153, and note.

Chancery jurisdiction in matters of administration is very extensive. Mr. Pomeroy says that the jurisdiction, as administered in England, "includes everything pertaining to the settlement of decedents' estates, except the probate of wills and the issue of letters testamentary and of administration": Pomeroy's Eq. Jur., sec. 77. Doubtless this statement is too broad for this country, where so much depends on statute; but in the case at bar, if the jurisdiction would exist independently of statute, we can see nothing in the statute, if the statute applies, to exclude it. In our view, Mr. West, if he had lived, could have retained out of the estate so much as was necessary to reimburse him for the funeral and probate expenses paid by him, and to compensate him for his services as administrator. His right of retainer was equivalent to a special lien enforceable by himself for his own benefit. Having died, he cannot enforce it, and the question is, whether equity will preserve the right and enforce it for the benefit of his estate. It seems to us that equity ought to interpose. *Actus Dei nemini nocet*. If, as is sometimes maintained, the principal ground of equitable relief in matters of administration is trust, the administrator being regarded as trustee of the assets in his hands, the circumstances here impart a special character to the trust, making it specially amenable to equitable enforcement. In *Smith v. Hoskins's Heirs*, 7 J. J. Marsh. 502, it was decided that an administrator who had paid debts of his intestate out of his own funds, expecting as-

sets, and was removed before they came to hand, was entitled to maintain a suit in equity against the subsequent administrator who had received assets, and against the heirs for reimbursement. The case is fully in point, save that the case at bar is stronger in this, that the administrator had assets in hand with the right of retainer, which he was prevented from exercising by death, and that the charges paid by him, together with the claim for compensation, are preferred claims. See also *Hays v. Cockrell*, 41 Ala. 75; *Barratt v. Wyatt*, 30 Beav. 442.

The defendant sets up by way of further defense that the complainant is not entitled to relief, because his intestate allowed more than three years to pass without rendering an account, and because the complainant has not rendered any account for him, and consequently the charges made by his intestate have not been allowed by the probate court. The record shows that the said intestate did not survive his wife by quite three years, and though he was doubtless neglectful in not earlier settling his account, yet we do not think his laches were such as should bar this suit, though they may be a proper matter for consideration in the costs. Neither do we think it was necessary for the complainant to have his intestate's account settled in the probate court before commencing suit here. If this court has jurisdiction in the matter, it has jurisdiction to settle the account as well as to enforce the payment of any balance which may be found in favor of the former administrator.

We will therefore sustain the bill, and unless the account of Charles H. West can be otherwise adjusted, will send the cause to a master to hear and report thereon.

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THE REASONABLE AND NECESSARY EXPENSES of the burial of a decedent are a charge upon his estate: See *Patterson v. Patterson*, 50 N. Y. 574; 17 Am. Rep. 384.

HUSBAND WHO PAYS FUNERAL EXPENSES OF WIFE may recover them from her executor in Massachusetts, her estate being primarily liable therefor under the statutes: *Constantinides v. Walsh*, 146 Mass. 281; 4 Am. St. Rep. 311. On the other hand, it is held in *Galloway v. Estate of McPherson*, 67 Mich. 546, 11 Am. St. Rep. 596, that the husband is liable for his wife's funeral expenses; and this being the common-law rule, it prevails wherever it has not been modified by statute: *Seare v. Giddy*, 41 Mich. 500; 32 Am. Rep. 168, and note.

MEDICAL EXPENSES ARE "NECESSARIES," and a husband has no right to withhold from his wife such medical assistance as her case may require: *State v. Housekeeper*, 70 Md. 162; 14 Am. St. Rep. 340.

**FUNERAL EXPENSES OF A DEBILITATED** include a tombstone erected over his grave: *Van Emon v. Superior Court*, 76 Cal. 589; 9 Am. St. Rep. 253.

**EQUITY HAS CONCURRENT JURISDICTION** with courts of ordinary for the purpose of distributing estates: *McGowan v. Lafburrow*, 82 Ga. 523; 14 Am. St. Rep. 178. A discussion of the extent to which the jurisdiction of equity is affected by statutes conferring similar jurisdiction upon courts of law will be found in the note to *Payne v. Bullard*, 55 Am. Dec. 77.

**LACHES WILL NOT PRECLUDE THE ASSERTION OF AN EQUITABLE RIGHT**, unless the adverse party has been induced by the delay to do or omit doing something in the premises which he would have refrained from doing or have done if the right had been more promptly asserted: *Great West Min. Co. v. Woodmas etc. Min. Co.*, 12 Col. 46; 13 Am. St. Rep. 204.

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## FRENCH v. PARKER.

[16 RHODE ISLAND, 219.]

**CONTRACT IN RESTRAINT OF EXERCISE OF PROFESSION VALID THOUGH UNLIMITED AS TO TIME.** — A covenant by a practicing physician not to engage at any time thereafter in the practice of medicine or surgery in a certain city is valid, and a court of equity will grant an injunction to restrain the covenantor from thereafter practicing his profession in said city.

**COURT OF CHANCERY WILL DECIDE QUESTIONS OF LAW AS WELL AS OF EQUITY, WHEN.** — When the common-law and chancery jurisdictions are vested in the same tribunal, the court sitting in equity will decide questions of law as well as of equity, and will grant or refuse relief according as it decides them.

**BILL** in equity for an injunction.

*William H. Clapp*, for the complainant.

*James M. Ripley and Nathan W. Littlefield*, for the respondent.

**DURFEE, C. J.** The case stated in the bill is to the effect that in February, A. D. 1887, the defendant, who was then a physician and surgeon, living and practicing his profession in the city of Pawtucket, published an advertisement offering to "relinquish a very lucrative practice to the 'right man' purchasing his real estate at its actual value"; that the complainant, likewise a physician and surgeon, was then living and practicing his profession in Waterbury, Connecticut; that he was led by the advertisement to enter into negotiations with the defendant, which resulted in his purchasing the said practice and estate, and his removal to Pawtucket with his family, at great expense, and there entering upon the practice of his

profession as the successor of the defendant; that he paid the defendant fifteen thousand dollars, over five thousand dollars of which was for the practice, the assessed value of the estate being less than ten thousand dollars, and not of so much value to the complainant except for his use as a practicing physician; that the defendant gave the complainant, in addition to the deed conveying the estate, a written covenant, by which, in consideration of one dollar and other valuable considerations, the defendant assigned his practice to the complainant, agreed to introduce and recommend the complainant to his patients, and also agreed not to engage at any time thereafter "in the practice of medicine or surgery in said city of Pawtucket." The bill alleges that the defendant has opened an office in Providence, advertised his card in the Pawtucket papers, visited his old patients, and is now practicing medicine and surgery in Pawtucket daily, to the great damage of the complainant; and that the defendant declares that he intends to continue to visit and prescribe professionally for all persons in Pawtucket who may call for him. The bill asks for an injunction to restrain the defendant from practicing in Pawtucket. The defendant demurs.

The defendant contends, in support of the demurrer, that the covenant, being a covenant in restraint of the exercise of a profession, is void because it is without limitation of time. The ground of this contention is, that such a contract is valid only when it is reasonable, and it is not reasonable if the restraint which it imposes is larger than is necessary for the protection of the party in whose favor it is imposed. This view is in accord with the language used by the judges in several English cases, but no case is cited in which it has been held finally that a contract in restraint of trade or business is void simply because the duration of the restraint is not limited. We know of no such case. In *Hitchcock v. Coker*, 1 Nev. & P. 796, also 6 Ad. & E. 438, the defendant had agreed not at any time to engage in the business of chemist and druggist, or either of them, in the town of Taunton, and the court of king's bench, on the authority of the language used by Tindal, C. J., in *Horner v. Graves*, 7 Bing. 735, 743, decided that the agreement was void because it was unlimited as to time; but on appeal to the judges in exchequer chamber, the decision was reversed, Tindal, C. J., delivering the opinion. In the course of his opinion he said: "We agree in the general principle that where the restraint of a party from carrying on

a trade is larger and wider than the protection of the party with whom the contract is made can possibly require, such restraint must be considered as unreasonable in law, and the contract which would enforce it must be therefore void." But distinguishing between extent and duration of restraint, he held, speaking for the court, that the contract was valid, because a trader has an interest in his trade beyond his own exercise of it, namely, the good-will, which may be sold, bequeathed, or become assets, and which it is therefore not unreasonable for him to have protected by a continuance of the restraint beyond his own life. The defendant contends that the ground of this decision is, that there is, in the case of a trade, a good-will, which may be bequeathed or may pass as assets, and which will therefore be the more valuable for a continuance of the restraint after the trader's death; whereas there is no good-will attaching to the profession of a physician or lawyer which can be bequeathed or pass as assets, and therefore any continuance of the restraint, after the death of the lawyer or physician, is unreasonable, because it will avail nothing. We think this is too narrow a view of the decision. One of the cases prominently cited in support of the decision was *Bunn v. Guy*, 4 East, 190, in which the covenant of an attorney not to practice within certain limits was held to be good, although the restraint was unlimited as to time. Of course the court would not have cited the case as authority for the decision, if they did not regard it as falling within the principle of the decision. Moreover, a third reason was given for the decision, namely, that the good-will of the trade might be sold during the life of the trader, and would sell for more if protected from competition during the life of the party restrained, than it would if it were protected only during the life of the trader. This reason is as valid in the case of a profession as of a trade, for whether, technically speaking, there be any good-will attending a profession or not, the professional practice itself would probably sell for more with the restraining contract if the restraint were unlimited in duration, than it would if the restraint were for the life of the promisee or covenantee only. If the complainant here wished to retire from his practice and sell it, he could probably sell it for more if he could secure the purchaser from competition with the defendant forever, than he could if he could only secure him from such competition during his own life. So if he wished to take in a partner, he could for the same reason

make better terms with him. It seems to us that the real principle of decision in *Hitchcock v. Coker*, 1 Nev. & P. 796, 6 Ad. & E. 438, was this, that if the contract be otherwise valid, it will not be held to be invalid simply because the restraint may continue beyond the life of the party for whose benefit it is accorded, if for any reason it may be beneficial to him to have it so continue. In *Archer v. Marsh*, 6 Ad. & E. 959, which was decided after, though heard before, the decision of the court of exchequer chamber in *Hitchcock v. Coker*, 1 Nev. & P. 796, 6 Ad. & E. 438, Lord Denman, commenting on the reversal of the judgment of the court of king's bench, said that the judgment was reversed "on the principle that the restraint of trade in that case could not be really injurious to the public, and that the parties must act on their view of what restraint may be adequate to the protection of the one, and what advantage a fair compensation for the sacrifice made by the other." This, if we understand it correctly, is equivalent to saying that if the restraint be otherwise not unreasonable, the courts will leave the parties to make their own terms in regard to its duration. And this is consonant with the uniform course of decision both before and since *Hitchcock v. Coker*, 1 Nev. & P. 796, 6 Ad. & E. 438; and see *Catt v. Tourle*, L. R. 4 Ch. App. 654.

Thus the party restrained in *Davis v. Mason*, 5 Term Rep. 118, was a surgeon; in *Hayward v. Young*, 2 Chit. 407, a surgeon and man midwife; in *Mallon v. May*, 11 Mees. & W. 652, a surgeon and apothecary; in *Bunn v. Guy*, 4 East, 190, an attorney; in *Butler v. Burleson*, 16 Vt. 176, a physician and surgeon; and in *McClurg's Appeal*, 58 Pa. St. 51, a physician. In all these cases the contracts were sustained, though unlimited as to time, simply because the area of restriction was not unreasonable. See also *Gilman v. Dwight*, 18 Gray, 356; 74 Am. Dec. 634; *Atkyns v. Kinnier*, 4 Ex. 776; *Hoyt v. Holly*, 89 Conn. 326; 12 Am. Rep. 390. In *Butler v. Burleson*, 16 Vt. 176, the court say: "Dr. Burleson can be as useful to the public in any other town as at Berkshire, and the lives and health of persons in other villages are as important as they are there."

In *Dwight v. Hamilton*, 113 Mass. 175, it was decided that a contract by a physician for the sale of his "practice and goodwill" in a particular town is valid, and carries with it an implied covenant on his part not to resume practice in the town, and that if he attempts to do so, the court will restrain him



by injunction. In *Whittaker v. Howe*, 3 Beav. 888, an agreement by a solicitor not to practice as solicitor in Great Britain for twenty years without the consent of the plaintiff, to whom he had sold his business on those terms, was held to be valid, and an injunction was granted to prevent breach. There the restraint was not unlimited, but plainly it might have lasted for years after the plaintiff's death. The contract is necessarily subject to a natural limitation, since it must terminate with the life of the party restrained, and, abstractly, there is no presumption that he will outlive the other party. It probably seldom happens that it makes any real difference whether the restraint is limited to the life of the party who profits by it or is left without limitation; since the physician, lawyer, or trader who sells out his business in one place to engage in it elsewhere is not likely, after a few years, if he has any ability, to want to break up and return to his old home and then start anew. The tree that is transplanted and retransplanted after coming into fruit is not often the better for it, and it may be questioned whether this consideration is not of itself reason enough for allowing the parties to suit themselves.

In *Hastings v. Whitley*, 2 Ex. 611, the defendant had given his bond not to carry on the business of surgeon or apothecary at a particular place. In suit thereon by the executors of the obligee the bond was held to be good. The report states that one of the points for the defendant was, that the bond was illegal and void if it should be construed to extend to the defendant's practicing his profession after the obligee's death. The court held that the obligation was co-extensive with the life of the obligor, and Parke, B., in giving judgment, said: "It was held in *Hitchcock v. Coker* that there was nothing illegal in the restriction being indefinite as to duration, the same being in other respects reasonable." The counsel for the defendant suggested, in the course of the hearing, the distinction which is here attempted, and the same judge replied: "What is the difference? The good-will of an apothecary is often disposed of"; and the court took no further notice of it, though the restraint extended to the business of the defendant as a surgeon, as well as to his business as an apothecary, if it can be supposed that Baron Parke meant to say that the calling of an apothecary is a mere trade.

The case, among the cases cited for the defendant, which comes nearest to an authority for him, is *Mandeville v. Harman*, 42 N. J. Eq. 185. In that case the defendant had covenanted not to engage in the practice of medicine or surgery in the city of Newark at any time afterwards. The suit was in equity by the covenantee for an injunction. The court refused the injunction, on the ground that whether a restraint so unlimited as to time is reasonable or not had never been decided in that state. The court did not decide that such a restraint is invalid, though its intimations were adverse to it. It referred to *Keeler v. Taylor*, 53 Pa. St. 467, 91 Am. Dec. 221, as holding that such contracts, if not limited to a reasonable time as well as confined to a reasonable space, are void at law. We have not been able to find any such doctrine in *Keeler v. Taylor*, 53 Pa. St. 467; 91 Am. Dec. 221. The injunction was refused there because the terms of the contract were hard and complex, the injunction being, in the opinion of the court, of grace, not of right. In *McClurg's Appeal*, 58 Pa. St. 51, which was in all points almost identical with the case at bar, the same court which had previously decided *Keeler v. Taylor*, 53 Pa. St. 467, 91 Am. Dec. 221, granted an injunction, with very strong remarks in favor of the jurisdiction: See per Sharswood, J., p. 55. *Mandeville v. Harman*, 42 N. J. Eq. 185, was a hard case for the defendant.

Our conclusion is, that it is not a sufficient reason for refusing the injunction that the contract is unlimited as to time. In this state the common-law and chancery jurisdictions are vested in the same tribunal, and it is the practice of the court, sitting in equity, to decide questions of law as well as of equity for itself, and to grant or refuse relief according as it decides them.

The defendant contends that it is not a breach of the contract for him to visit his old patients in Pawtucket when summoned by them from Providence. We think it is clearly a breach, his contract being not to engage at any time in the practice of medicine or surgery in the city of Pawtucket. It is true that the complainant may not get the patients if the defendant does not visit them, but it is the chance of getting them from the defendant's not practicing in Pawtucket which the complainant purchased, and this chance we think he is entitled to have secured to him.

Demurrer overruled.

IF THE STIPULATIONS OF A CONTRACT IN RESTRAINT OF TRADE are otherwise reasonable, the circumstance that it is indefinite in time will not affect its validity: Note to *Angier v. Webber*, 92 Am. Dec. 754, and cases there cited.

THE RESTRAINT AS TO SPACE should not be greater than is necessary to afford a reasonable protection to the interests of the covenantee: Note to *Angier v. Webber*, 92 Am. Dec. 755. Numerous cases are there cited, upholding contracts, like that in the principal case, restraining the exercise of a trade or profession within the limits of a city. Even when the covenant is good at law, so that damages are recoverable for its breach, equity will not enforce it if the terms are at all hard or even complex: *Keeler v. Taylor*, 53 Pa. St. 467; 91 Am. Dec. 221.

WHERE LAW AND EQUITY ARE ADMINISTERED by the same court, plaintiff is entitled to all the relief formerly afforded both by a court of law and equity: *Rankin v. Charles*, 19 Mo. 490; 61 Am. Dec. 574; *Piercy v. Sabia*, 10 Cal. 22; 70 Am. Dec. 692; *Blair v. Smith*, 114 Ind. 114; 5 Am. St. Rep. 593.

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## KELLEY v. FLAHERTY.

[16 RHODE ISLAND, 234.]

**SLANDER — WORDS CHARGING UNMARRIED WOMAN WITH FORNICATION ACTIONABLE PER SE.** — An accusation is actionable that falsely charges an offense which, if proved, may subject the party charged therewith to a punishment not ignominious, but which brings disgrace. And therefore words charging an unmarried woman with fornication are actionable *per se* in Rhode Island, although the punishment for fornication in that state is simply a fine of not over ten dollars, which is recoverable by complaint and warrant, not by indictment.

**SLANDER.** After the plaintiff obtained a verdict in the common pleas, the defendant moved to arrest the judgment, on the ground that the declaration did not set out any cause of action. The motion was dismissed, and the defendant excepted.

*Charles H. Page and Franklin P. Owen*, for the plaintiff.

*Ambrose E. West*, for the defendant.

**DURFEE, C. J.** The defamatory words alleged to have been spoken of the plaintiff are the following, to wit: "You are a bitch and a whore. You visit the Halfway House, and got your dress there." The motion in arrest raises the question whether the words are actionable *per se*, no special damages being alleged. The innuendo added in the declaration is: "Meaning and intending to charge said plaintiff with fornication and adultery, and with obtaining a dress by illicit intercourse at the Halfway House." We think, however, that, as

there is no inducement or prefatory averments in the declaration, the words cannot be deemed to impute to the plaintiff anything more than fornication. The question then is, whether words imputing to an unmarried woman the offense of fornication are actionable *per se*.

At common law, fornication was not a criminal offense, and words charging a woman with it were not actionable *per se*. In the United States, generally if not everywhere, it is a misdemeanor by statute; but upon the question whether words charging it are actionable *per se*, there is a diversity of decision. In several states such words are made so by statute: Townshend on Slander and Libel, sec. 153. In the leading case of *Brooker v. Coffin*, 5 Johns. 188, it was held that words imputing criminality are actionable *per se* when they impute an indictable offense involving moral turpitude, or an offense which exposes the offender to an infamous punishment. This rule has been widely recognized, and is probably the rule which is the more generally accepted: Cooley on Torts, 196, 197. Under it the words here complained of are not actionable *per se*, since in this state the punishment for fornication is simply a fine of not over ten dollars, which is recoverable by complaint and warrant, not by indictment. In Massachusetts, in *Miller v. Parish*, 8 Pick. 384, the rule was laid down more broadly, namely: "Where an offense is charged which, if proved, may subject the party to a punishment not ignominious, but which brings disgrace upon the party falsely accused, such an accusation is actionable"; and in that case it was held to be actionable *per se* to charge an unmarried woman with fornication. See also *Brown v. Nickerson*, 5 Gray, 1; *Kenney v. McLaughlin*, 5 Gray, 3; 66 Am. Dec. 345. The rule laid down in *Miller v. Parish*, 8 Pick. 384, appears to be the recognized rule in several states: *Patterson v. Wilkinson*, 55 Me. 42; *Woodbury v. Thompson*, 8 N. H. 194; *Symonds v. Carter*, 82 N. H. 458; *Vanderlip v. Roe*, 23 Pa. St. 82; *Ranger v. Goodrich*, 17 Wis. 80; *Mayer v. Schleichter*, 29 Wis. 646; *Hoag v. Hatch*, 23 Conn. 585, 590; *Zeliff v. Jennings*, 61 Tex. 458. We think it the better rule; for it seems to us that the defamatory effect of words charging a disgraceful offense is substantially the same, whatever the form of criminal procedure under which the offense be punished. In Iowa and Ohio, words charging an unmarried woman with fornication are held to be actionable *per se*, "on the broad and plain ground that it would immediately and necessarily tend to hinder her advancement," the

presumption of damage being allowed to supply the place of actual proof: *Cleveland v. Detweiler*, 18 Iowa, 299; *Barnett v. Ward*, 36 Ohio St. 107; 38 Am. Rep. 561.

Exceptions overruled.

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**SLANDER — CHARGE OF ADULTERY. — TO CHARGE A FEMALE WITH WANT OF CHASTITY** is not actionable at common law: *Elliot v. Ailsberry*, 2 Bibb, 473; 5 Am. Dec. 629. The same case also holds that the fact that fornication is punishable by a fine makes no difference, and that words imputing a crime are not actionable unless the offense is one involving moral turpitude, and exposing the person who commits it to an infamous, that is to say corporal, punishment. This view still prevails in most states, but the rule laid down in the principal case has been extensively adopted, and a few courts have gone still further, and enunciated the broad principle that charges of unchastity necessarily import special damage to a female, and are actionable on that ground: *Malone v. Stewart*, 15 Ohio, 319; 45 Am. Dec. 577. In some states, this last doctrine has been embodied in legislation.

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## BALDWIN v. EMERSON.

[16 RHODE ISLAND, 204.]

**NON-RESIDENT SUITOR ATTENDING COURT NOT EXEMPT FROM SERVICE OF SUMMONS. —** In Rhode Island a non-resident suitor attending court in the prosecution of a suit is not exempt from the service of a summons against him in another suit.

### ASSUMPSIT.

*Charles F. Baldwin and Irving Champlin*, for the plaintiff.

*Edward D. Bassett*, for the defendant.

MATTESON, J. This is an action of *assumpsit* brought in the court of common pleas, the writ in which was served by summoning the defendant. The defendant pleaded in abatement of the suit that at the time of the service he was a citizen of Boston, Massachusetts, and was in attendance upon this court in a suit in which he was plaintiff, and the present plaintiff was defendant. The plaintiff demurred to the plea, and the defendant joined in the demurrer. The court, upon hearing, sustained the demurrer and overruled the plea. The defendant thereupon excepted, and now petitions for a new trial, alleging that the ruling was erroneous.

The question whether a party in attendance upon a court, in the prosecution or defense of a suit, is privileged from the service of a summons for the commencement of a suit against him, is one upon which there has been a contrariety of decis-

ion. The general rule relating to protection from the service of process is, that all persons who have any relation to a cause which calls for their attendance in court are protected from arrest while going to and attending court and returning. This protection, however, is not wholly, nor chiefly, the privilege of the person, but is granted in the interest of the public, that the courts may not be embarrassed or impeded in the conduct of their business. Hence it has generally been held, that the protection is limited to exemption from arrest, and does not extend to the service of process which does not interfere with or prevent the attendance of the person upon the court: *Bours v. Tuckerman*, 7 Johns. 538; *Hopkins v. Ceburn*, 1 Wend. 292; *Hunter v. Cleveland*, 1 Brev. 167; *Sadler v. Ray*, 5 Rich. 523; *Legrand v. Bedinger*, 4 T. B. Mon. 539; *Grove v. Campbell*, 9 Yerg. 7; *Page v. Randall*, 6 Cal. 32. In *Hayes v. Shields*, 2 Yeates, 222, and *Miles v. McCulloch*, 1 Binn. 77, however, it was held that exemption should be granted from summons as well as arrest, the reasons assigned in the former case being that the party's attention to his own business in the suit depending would be distracted by the service, and that he might be subjected to the inconvenience of attending an action at a distance from his place of abode, contrary to the wise indulgence of the law.

In some of the cases, the question whether non-residents of the state attending court are entitled to protection from the service of a writ by summons for the commencement of a suit has been considered.

In *Bishop v. Voss*, 27 Conn. 1, the defendant, a resident of another state, had come into Connecticut to attend the trial of a suit which he had caused to be brought in one of the courts of that state, and it was held that he was not exempt from the service of a summons, the fact that he came from another state not putting him on any better footing than if he had been a resident of the state. Subsequently, it was held in *Wilson Sewing Machine Co. v. Wilson*, 22 Fed. Rep. 803, 51 Conn. 595, that a non-resident defendant, who was in attendance upon the court in the trial of his case, his presence being necessary, both as a witness and for the purpose of instructing his counsel, was protected from the service by summons of a new writ against him. The court, however, expressly limited its decision to the case of a non-resident defendant, suggesting that there is, perhaps, a reason why a plaintiff who has voluntarily sought the aid and protection of the

courts of another state should not shrink from being subjected to their control, which does not apply to a defendant whose attendance is compulsory.

In New York, while it has been held that the protection is from arrest only, and not from service of a summons, an exception has been made in favor of non-resident witnesses: *Norris v. Beach*, 2 Johns. 294; *Sanford v. Chase*, 3 Cow. 381; *Hopkins v. Coburn*, 1 Wend. 292; *Seaver v. Robinson*, 8 Duer, 622; *Poliard v. Union Pacific R. R. Co.*, 7 Abb. Pr., N. S., 70; *Person v. Grier*, 66 N. Y. 124; 23 Am. Rep. 35; *Jenkins v. Smith*, 57 How. Pr. 171. The grounds upon which this exception rests are, that witnesses from out of the state, being beyond the reach of subpoena, cannot be compelled to attend. Hence, if they attend at all, their attendance must be voluntary, and as their attendance is often necessary for the ends of justice, especially in criminal trials in which the accused is entitled to be confronted with the witnesses against him, and as the liability to be served with summons for the commencement of a suit in another jurisdiction than that of their residence might as effectually deter them from attending as the liability to arrest, public policy requires that they should be protected against such service, as well as arrest, as an encouragement to them to attend. In *Merrill v. George*, 23 How. Pr. 331, a non-resident defendant who was in attendance as a witness was held privileged, not only from arrest, but from any action brought against him. The court did not, however, base the right to exemption on the ground that the non-resident was a defendant, but that he was a witness. Notwithstanding the above decisions, which might well have been considered as settling the rule in New York, it was held in a recent case in that state (*Matthews v. Tufts*, 87 N. Y. 568) that service by summons could not be made upon a non-resident creditor of a bankrupt attending a meeting of creditors before a register in bankruptcy for the choice of an assignee. The court in its opinion takes no notice of the earlier decisions, and refers to but two prior New York cases, viz., *Person v. Grier*, 66 N. Y. 124, 23 Am. Rep. 35, in which, as we have seen, the court rested its decision on the ground that the non-resident defendant was a witness, and *Van Lieu v. Johnson*, an unreported case cited in *Person v. Grier*, 66 N. Y. 124, 23 Am. Rep. 35, in which, it is said, the court decided that a non-resident defendant while attending court could not be served with summons.

In Minnesota, in *Sherman v. Gundlach*, 24 Reporter, 335, it



was also held that a non-resident witness who had in good faith come into that state to give evidence in a cause is exempt from the service of a summons against him in a civil action in coming, in attendance, and for a reasonable time thereafter in which to return.

In New Jersey, suitors from other states are privileged from the service of a summons: *Halsey v. Stewart*, 4 N. J. L. 366, in which the non-resident was a plaintiff; *Dungan v. Miller*, 37 N. J. L. 182, which was the case of a non-resident defendant.

In the United States circuit court for the third circuit, embracing Pennsylvania and New Jersey, the same doctrine was held in relation to a non-resident defendant: *Parker v. Hotchkiss*, 1 Wall. Jr. 269. And so, also, in the United States circuit court for the seventh circuit, in the district of Wisconsin, in *Juneau Bank v. McSpedan*, 5 Biss. 64.

The reasons assigned for the exemption of non-resident suitors from the service of a summons are, that courts of justice ought to be open and accessible to suitors; that they ought to be permitted to approach and attend the courts in the prosecution of their claims and the making of their defenses, without the fear of molestation or hindrance; that their attention ought not be distracted from the prosecution or defense of the pending suit; that they might be deterred from prosecuting their just rights or making their just defenses to a suit by reason of their liability to suit in a foreign jurisdiction. While we concede the force of the reasons advanced for protecting non-resident witnesses from the service of a summons against them for the commencement of a suit, *ex uno, morando et redeundo*, we are not convinced of the sufficiency of the reasons assigned for the exemption of non-resident suitors from such process. We think it would rarely happen that the attention of a non-resident plaintiff or defendant would be so distracted by the mere service of a summons from the immediate business in hand, in prosecuting or defending a pending suit, that the interests of justice would suffer in consequence, or that the liability to such service would often deter them from prosecuting or defending their just claims or rights. The reasons assigned for the exemption would apply equally as well to resident as to non-resident suitors, and it has never been deemed necessary to exempt resident suitors from the service of a summons, so far as we have been able to find, except in the single state of Pennsylvania. We think the reasons are fan-

ciful rather than substantial. We are of the opinion, therefore, that a non-resident suitor attending court in the prosecution of a suit is not exempt from the service of a summons against him in another suit. The petition for a new trial is denied and dismissed, with costs.

Exceptions overruled.

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**WITNESSES, PRIVILEGE OF. — AN EXTENDED DISCUSSION** of the privilege of witnesses from service of civil process will be found in the note to *In re Healey*, 38 Am. Rep. 717-722. Such service is allowed under English practice: *Pool v. Gould*, 1 Hurl. & N. 99; and in many jurisdictions in this country. In others, as in Indiana, the summons will be vacated: *Wilson v. Donaldson*, 117 Ind. 356; 10 Am. St. Rep. 48. In New Jersey such a service is not void, but may be set aside if circumstances demand it: *Macey v. Colville*, 45 N. J. L. 119; 46 Am. Rep. 754.

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## ATKINSON, PETITIONER.

[16 RHODE ISLAND, 412.]

**DEPOSITS IN TRUST MADE BY PARENT FOR HIS CHILDREN TREATED AS GIFTS, NOT ADVANCEMENTS, WHEN. —** Where a father makes a deposit in a savings bank in the name of each of three of his six children, himself as trustee, draws no part of the principal or interest of such deposits, retains the deposit-books until his death, tells each of his said children that the money shall be theirs at his death, and makes no charge nor memorandum nor delivery in the presence of witnesses, as required by statute to evidence an advancement, such deposits are to be regarded as gifts, and not as advancements, and each of said children is, on the father's death, entitled to receive the deposit made in his name, and to hold it as his own without accounting for it to the estate. And where the father also makes a like deposit in a similar manner for another of his said children, and afterwards withdraws it with the interest thereon, and invests the same in his individual name, such child will be entitled to the money deposited for him, with the interest which has accrued thereon, both under the original and later form of deposit, for the trust in his favor having been once completely constituted, the trustee had no power to revoke it.

**CASE** stated for an opinion of the court.

*Jacob W. Mathewson*, for the claimant children of William Atkinson.

*Louis L. Angell*, for the administratrix.

**DURFEE, C. J.** This is a case stated for the opinion of the court. It shows that William Atkinson died intestate, February 18, 1888, leaving a widow and six children, three sons and three daughters, parties to the statement, the widow be-

ing likewise administratrix on his estate. He left personal estate to the amount of seventeen thousand dollars in excess of all his debts and liabilities, and of the deposits hereinafter mentioned. On January 15, 1885, he deposited two thousand dollars of his own money in the Mechanics' Savings Bank, making an entry on the signature-book of the bank as follows, to wit: "Willie J. Atkinson, William Atkinson, trustee." The bank opened an account in form following, to wit: "Mechanics' Savings Bank in account with Willie J. Atkinson, William Atkinson, trustee," and gave to William Atkinson a pass-book, in which the account was entered in the same manner, which book said William retained until October 19, 1886, when he drew the deposit and interest, and invested the same in his individual name. Likewise, January 15, 1885, he deposited in the same manner two thousand dollars in the names respectively of Samuel M. and Robert W. Atkinson, and one thousand dollars in the name of Anna L. Atkinson. Said Willie J., Samuel M., and Robert W. were the sons of William Atkinson. Anna L. was one of his daughters, and had served him as confidential clerk and book-keeper for about fourteen years. He drew no part of the principal or interest of either of the last three accounts, but retained the deposit-books until he died. He told each of the four, in his lifetime, that he had made the deposits for them, and that the money would be theirs at his death. He neither made nor caused to be made any charge or memoranda of the deposits other than as above stated, and never delivered to either of his children the pass-book of the deposits standing in his or her name. He made no deposit or gift to his other two children, except small and ordinary presents. The principal question is, whether the deposits are to be regarded as gifts or advancements under the statute (Pub. Stat. R. I., c. 187, sec. 20), and if they are to be regarded as gifts, what claim has William J. on the assets for the withdrawal of the deposit for him.

We do not see how the deposits can be regarded as advancements, since they were never charged to the children, nor was any memorandum made of them, as the statute requires for advancements. The writing in the bank-book and in the pass-books was simply the writing which was appropriate to the deposits, between the bank and the depositor, and in our opinion cannot be deemed to be a charge or memorandum within the meaning of those words, or either of them, as used in the statute.

The case stated seems to us to be identical in its material features with the case of *Ray v. Simmons*, 11 R. I. 266, 23 Am. Rep. 447, unless it can be distinguished in point of principle from the latter case by reason of the difference in the form in which the deposits were entered. In *Ray v. Simmons*, 11 R. I. 266, 23 Am. Rep. 447, the form of entry was "Dr. Fall River Savings Bank, in account with Levi Bosworth, trustee for Marianna Ray, Prov. Cr." The depositor received a pass-book in which the same form was used. He handed this book to Miss Ray, who read the entry and thanked him for his present, but did not retain the book. The question came up in the settlement of his estate, whether the deposit was a part of the estate or should go to Marianna Ray, and the court held that it should go to her, being of the opinion that a trust for her in respect of the deposit had been completely constituted. The same view had been previously taken by the supreme court of Connecticut in *Minor v. Rogers*, 40 Conn. 512, 16 Am. Rep. 69, though that fact was not known to this court when *Ray v. Simmons*, 11 R. I. 266, 23 Am. Rep. 447, was decided. And the decision in *Ray v. Simmons*, 11 R. I. 266, 23 Am. Rep. 447, has been followed in New York, in *Martin v. Funk*, 75 N. Y. 134, 31 Am. Rep. 446, in which case an elaborate opinion was delivered by Chief Justice Church. There are cases which hold otherwise, but it seems to us that the courts which decided them did not sufficiently distinguish between a gift, which requires a delivery of the thing given, actual or symbolical, and the creation of a voluntary trust, which requires for its conservation, not a delivery of the subject of the trust to the beneficiary, but a retention of it by the trustee for the beneficiary's benefit; and of course, where the donor makes himself the trustee, a retention of it by the donor as trustee for his benefit.

The question, then, is, whether the case stated differs materially from *Ray v. Simmons*, 11 R. I. 266, 23 Am. Rep. 447, owing to the different manner in which the deposit was entered. We do not think it does. We think it is plain that the intention of the depositor was not to give the deposits directly to the children severally named in them, but to give them through the medium of as many trusts, wherein he himself should be the trustee for them; and the deposits being deposits of money or personalty, we know of no technical rule which prevents our construing them according to their essential character as determined by the intention. Deposits in this form appear not

to be uncommon in this state, and have been treated by this court in a previous case as deposits in trust. It follows that the aforesaid Samuel, Robert, and Anna are entitled to have to have the money deposited for them, and to hold it as their own without accounting for it in the settlement. The said Willie J. is also entitled to the money deposited for him, with the interest which has accrued thereon, both under the original and later form of deposit; for, the deposit having been kept entire, we think it is fair to suppose that the purpose was simply to transfer it from one bank to the other without violating the trust. The trust having once been completely constituted, the trustee had no power to revoke it. The declaration of the trustee to the beneficiaries, as above stated, shows that he understood it to be completely constituted, and is inconsistent with the suggestion that the deposits were made in the form of trusts to evade any rule of the bank. The case stated does not show that there was any rule of the bank limiting the deposits.

We think the foregoing sufficiently answers the questions propounded by the cases stated.

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ADVANCEMENT IS GIVING, BY ANTICIPATION, the whole or a part of what it is supposed a child will be entitled to on the death intestate of the party making it: *Darne v. Lloyd*, 82 Va. 859; 3 Am. St. Rep. 123. A gift to a child or heir by an ancestor in his lifetime is *prima facie* advancement: *Grattan v. Grattan*, 18 Ill. 167; 65 Am. Dec. 726. As between a loan, a gift, and an advancement, the presumption is in favor of an advancement, because of its tendency towards that equality of distribution among the children which is presumed to have been intended: *Patterson's Appeal*, 128 Pa. St. 269. This presumption may be rebutted by circumstances which indicate that an advancement was not intended: *Hall v. Hall*, 107 Mo. 101; *Watson v. Murray*, 54 Ark. 499; or by parol evidence: *Brook v. Latimer*, 44 Kan. 431; 21 Am. St. Rep. 292; *Barbee v. Barbee*, 109 N. C. 299; unless where the provisions of a statute exclude this class of evidence, as in Illinois: *Wilkinson v. Thomas*, 128 Ill. 363. The admissibility of parol evidence was not involved in the principal case, but the Rhode Island statute apparently requires the same construction in this respect as that of Illinois.

ABSOLUTE AND UNCONDITIONAL TRUSTS are irrevocable except with the consent of the beneficiaries: *Minot v. Tilton*, 64 N. H. 371; compare *Petition of Thurston*, 154 Mass. 596, 26 Am. St. Rep. 278, and cases cited in note to *Dickerson's Appeal*, 2 Am. St. Rep. 552. Nor can they be revoked by the donor's undertaking to annex to them special terms and qualifications not expressed in the original declaration of trust: Note to *Dickerson's Appeal*, 2 Am. St. Rep. 552.

## BREWER v. NASH.

[16 BRIDE ISLAND, 453.]

**ESTOPPEL — MORTGAGOR RETAINING PROCEEDS OF MORTGAGE SALE ESTOPS HIM FROM DENYING PURCHASER'S TITLE, WHEN.** — Where a mortgagor, after a defective exercise of the power of sale in a mortgage, receives the surplus proceeds of the sale, without knowledge of the defects in the sale, but retains such proceeds after he learns of such defects, he will be estopped from denying the purchaser's title. He cannot be permitted to repudiate the mortgage sale, and at the same time insist upon having the benefit of it.

**SUBROGATION — PURCHASER AT DEFECTIVE MORTGAGEE'S SALE SUBROGATED TO RIGHTS OF MORTGAGEE, WHEN.** — A *bona fide* purchaser at a mortgagee's sale which proves to be defective, who has paid the amount of his bid which has been applied to the mortgage debt, is entitled to be subrogated to the rights of the mortgagee, and the mortgage will be regarded in equity as assigned to such purchaser, even though the mortgagee's deed to him does not contain language amounting to a legal assignment. Such purchaser is not to be regarded as a mere stranger to the estate. Nor does it make any difference in equity that the mortgage was discharged on the record after the purchaser's right to subrogation had already accrued to him.

**BILL** in equity for an injunction.

*Nicholas Van Slyck and Cyrus M. Van Slyck*, for the complainants.

*Albert B. Crafts*, for the respondents.

**DURFEE, C. J.** The case stated in the bill is this: October 16, A. D. 1876, George M. Nash, being owner in fee-simple of two lots of land in the town of Westerly, mortgaged them to the Westerly Savings Bank as security for his promissory note to said bank for seven thousand five hundred dollars, with power to Simeon F. Perry, treasurer of said bank, or his successors in office, to sell said lots in case of default. George M. Nash subsequently died, leaving a widow and four children, George E., Frank H., Harriet J., and Anna Nash, his sole heirs at law, said Anna being a minor. Afterward the widow and the three adult children, together with the guardian of said Anna, thereunto duly authorized, gave a second mortgage to said bank on said two lots and another lot and certain personal property, as security for a note for seven thousand five hundred dollars given by said George E. for the common benefit of all the grantors. The mortgage contained a power to the bank to sell in case of default. August 17, A. D. 1881, the conditions of both mortgages having been broken, the bank advertised the mortgaged property, except

the lot not in the first mortgage, for sale at auction under the powers in both mortgages, and at the auction caused the same to be struck off to James D. Brewer, the highest bidder, for nineteen thousand five hundred dollars, on receipt of which it gave him a deed. The deed purports to convey to him the property so struck off to him, and purports in the body to be the deed of the mortgagors in both mortgages, but by the Westerly Savings Bank as attorney under the powers in both, and is signed and sealed only by the mortgagors in the second mortgage by said savings bank through the agency of Simeon F. Perry, treasurer. James D. Brewer entered under the deed, and upon the faith of it spent large sums in improvements. He died in 1886, leaving a son, the complainant Edward S. Brewer, who succeeded him in ownership, and likewise spent large sums in improvements. The bank, after retaining out of the proceeds of the mortgage sale enough to pay the expenses and the two mortgages, having a surplus, paid it over to Samuel H. Cross, who was administrator and agent for the estate of George M. Nash, and also guardian for Anna Nash. The bill alleges that Cross paid over their shares of the surplus to the widow of George M. Nash, to Harriet J. Nash, Frank H. Nash, and Jessie H. Cross, assignee of George E. Nash, and that they received the same well knowing it to be the surplus from the money paid by James D. Brewer, and afterward, on Anna Nash, his ward, attaining her majority, paid to her, as part of her estate in his hand, her share of said surplus, which she received knowing it to be a part of said surplus. The deed to James D. Brewer was made October 6, A. D. 1881, and December 8, 1881, the bank discharged on the record both mortgages. June 28, A. D. 1887, Anna Nash, Frank H. Nash, and Harriet J. Nash brought an action of ejectment against John F. Champlin and Charles A. Stone, tenants of Edward S. Brewer of the first of the tracts of land described in the two mortgages, to recover possession of their undivided fourth parts thereof. This bill is brought against them to have them enjoined from prosecuting said action. They have demurred to it generally for want of equity.

It is not clear to us that the deed given by the bank to James D. Brewer is not good as a conveyance under the second mortgage so far as the widow and the three older children of George M. Nash are concerned. But it is assumed by the complainants and urged by the defendants that there are defects of sale or execution which invalidate it as a legal



instrument, though the defects assumed on the one side and urged on the other are not the same. The complainants seek relief on the ground of equitable estoppel, and we will consider the case on that ground; for whether the conveyance be good at law as against the widow and the older children or not, it is not good at law as against Anna Nash, since the authority to mortgage conferred upon her guardian did not authorize the insertion of the power to sell in the mortgage: *Barry v. Clarke*, 18 R. I. 65.

The contention of the complainants is, that the defendants, who are plaintiffs in the ejectment suit, having received their shares of the proceeds of the mortgage sale, knowing them to be such shares, and having allowed the purchaser and his son to go on improving the estate at great expense in the belief that their title was good, are equitably estopped from now denying the title, and should therefore be enjoined from prosecuting their action at law. There can be no doubt that the parties receiving the money would be subject to such estoppel, if, when they received it, they knew not only that it was a part of the proceeds of the mortgage sale, but also the circumstances which invalidate, or are supposed to invalidate, that sale and the conveyance under it: *Smith v. Warden*, 19 Pa. St. 424; *Maple v. Kussart*, 58 Pa. St. 348; 91 Am. Dec. 214; *Brewster v. Baker*, 16 Barb. 613; *Breeding v. Stamper*, 18 B. Mon. 175; *Wood v. Seely*, 82 N. Y. 105; *Flanigan v. Turner*, 1 Black, 491; *Pursley v. Hays*, 17 Iowa, 310; *Deford v. Mercer*, 24 Iowa, 118; 92 Am. Dec. 460; *Sloan v. Frothingham*, 72 Ala. 589, 608. The bill does not allege such knowledge. But assuming that such knowledge was necessary to create the estoppel, and that the parties have not lost their right to insist upon it by their laches and delay, it still seems clear to us that if the parties who received the money without the knowledge continue to keep the money after acquiring it, the estoppel will likewise continue. They cannot be permitted to repudiate the mortgage sale, and at the same time insist upon having the benefit of it: *Maple v. Kussart*, 58 Pa. St. 348; 91 Am. Dec. 214. But furthermore, we think the complainants are entitled to relief on another ground.

James D. Brewer entered into possession of the premises, which the defendants are trying to recover at law, as purchaser at the mortgagee's sale, and continued to occupy them during his life as such, and the complainant Edward S. Brewer has succeeded to his title or supposed title and occu-

pation; and therefore, if for any reason his title under the mortgagee's sale is defective, why should he not be allowed to protect himself under the mortgages, holding, at least, by title as good as the mortgagee would have had if there had been no sale? The language of 2 Jones on Mortgages, sec. 1902, is: "If the sale under the power is subsequently declared void for any irregularity, a purchaser who has paid the purchase-money is subrogated to the rights of the mortgagee under the mortgage, which is regarded as assigned to him." Of course the deed given by the mortgagee under a void sale may contain language which will amount to a legal as well as an equitable assignment: *Brown v. Smith*, 116 Mass. 108; *Burns v. Thayer*, 115 Mass. 89; but the doctrine is, that even without such language, the purchaser who has paid the purchase-money is entitled to be regarded in equity as if he were the assignee of the mortgage: *Jones v. Mack*, 58 Mo. 147; *Honaker v. Shough*, 55 Mo. 472; *Russell v. Whitely*, 59 Mo. 196; *Johnson v. Robertson*, 84 Md. 165; *Robinson v. Ryan*, 25 N. Y. 320; *Muir v. Berkshire*, 52 Ind. 149; *Brobst v. Brock*, 10 Wall. 519, 534; *Johnson v. Sandhoff*, 30 Minn. 197; *Sloan v. Frothingham*, 72 Ala. 589, 604; *Frische v. Kramer's Lessee*, 16 Ohio, 125; 47 Am. Dec. 368; *Stark v. Brown*, 12 Wis. 572; 78 Am. Dec. 762; *Kelly v. Duff*, 61 N. H. 435; *Taylor v. Agricultural etc. Association*, 68 Ala. 229.

The grounds of decision are not very fully developed in these cases, but it seems to us that the true ground is this, that while ordinarily a stranger to the estate who voluntarily pays off a mortgage thereon is not entitled to subrogation to the rights of the mortgagee, a purchaser at the mortgagee's sale, even when the sale is void, is not to be regarded as a mere stranger; but that, having bid off the estate in good faith on the invitation of the mortgagee to do so, when, supposing his bid to have been effectual to invest him with the equitable or executory title, he pays the amount of his bid, and the same is applied to the mortgage debt, he has a most persuasive equity to be subrogated to at least the rights of the mortgagee who invited his confidence. In such a case the court does simply what the mortgagee would be bound in conscience to do himself, if he could, when it treats the purchaser as the assignee of the mortgage. And of course, where the purchaser has entered under the mortgagee's deed and made improvements, this equity is strengthened: *Muir v. Berkshire*, 52 Ind. 149. In *Kelly v. Duff*, 61 N. H. 435, where a person,

erroneously supposing he had an interest in an estate, paid off a mortgage thereon, it was held that he was entitled to be treated as an equitable assignee of the mortgage. And in this view, it also seems to us that it does not matter that the power of sale in the second mortgage was invalid, so far as it purported to be executed by the guardian of Anna Nash, since she does not for that reason have any better right than her brothers and sisters have to profit by the payment of the mortgages. Nor do we see that it makes any difference in equity that the mortgages were discharged on the record, the discharge having been made on the assumption that the title to the estate had vested in the purchaser, and after his equitable right to subrogation had already accrued to him: *Bacon v. Goodnow*, 59 N. H. 415; *Guckian v. Riley*, 135 Mass. 71, 74.

Demurrer overruled.

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**MORTGAGES AND VOID FORECLOSURES.** — WHEN A MORTGAGOR RATIFIES A SALE under an irregular or defective power, the purchaser's title is not affected by defects in the original power to sell: *Fort Worth Nat. Bank v. Daugherty*, 81 Tex. 301. The purchaser of property sold under a void foreclosure of a mortgage thereof may be subrogated to the rights which the mortgagor originally had, if the sale and purchase are afterwards set aside: *Dutcher v. Hobby*, 86 Ga. 198; 22 Am. St. Rep. 444; compare *King v. Brown*, 80 Tex. 276. But a mortgagee cannot be compelled to assign his mortgage, unless the person claiming such assignment is a surety who has paid the mortgage debt, or one bound to pay the debt by reason of some similar relation, or one who has special equities by reason of the mortgagee's contract or conduct: *Holland v. Savings Bank*, 16 R. I. 734.

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## MAHOGANY v. WARD.

[18 RHODE ISLAND, 479.]

**NEGLECT OF RESPONSIBLE AGENT INTERVENING BETWEEN DEFENDANT'S NEGLIGENCE AND DAMAGE SUFFERED BREAKS CAUSAL CONNECTION, WHEN.** — When the independent act of a responsible person intervenes between the defendant's negligence and the injury sustained, such act breaks the causal connection between the negligence and the damage, and he who is guilty of the original negligence is not chargeable, but redress must be sought from him who directly caused the injury, unless the intervening act is such as might reasonably have been anticipated as the natural or probable result of the original negligence, in which latter case the original negligence will be regarded as the proximate cause of the injury, and will render the person guilty of it chargeable. Where, therefore, a person driving on a country highway meets another, also driving, who fails to turn out, as required by statute, and the former is compelled to drive upon the side of the road and is injured

by colliding with a post in the highway standing outside of but near to the traveled part, the town will not be liable for the injury, but the person whose independent act was the proximate cause of the injury will be liable therefor.

**ACTION on the case.**

*Francis B. Peckham and Patrick J. Galvin, for the plaintiffs.*

*William P. Sheffield and William P. Sheffield, Jr., for the defendant.*

**MATTESON, J.** This is an action of the case against the defendant, in his capacity as town treasurer of Middletown, to recover damages for injuries suffered by the plaintiff, Mrs. Mahogany, by reason of the neglect of the town to keep one of its highways safe and convenient for travelers, as required by the statute. The neglect complained of was, that the town permitted a post to remain on the side of the highway, so near to the traveled part as to be dangerous to persons driving along such highway. At the trial the defendant contended that as the accident occurred on the side of the road, outside of the traveled carriage-way, and as the plaintiff, Mrs. Mahogany, left the carriage-way without necessity for so doing occasioned by the condition of the highway, she assumed the risk of or incident to traveling outside of the carriage-way. The plaintiffs in reply alleged, and offered testimony to prove, that one Abner B. Lawton was at the time driving on the highway opposite, or nearly opposite, to the post complained of, and that he neglected to turn to the right of the center of the traveled part of the road, and thereby compelled Mrs. Mahogany to drive upon the side of the road, where, notwithstanding she was in the exercise of due care, her carriage came in contact with the post, and she sustained the injuries to recover damages for which this suit is brought. The defendant urged, in reply to this allegation of the plaintiffs, that if the injuries resulted from the wrongful act of Lawton in not driving to the right of the center of the traveled way, or would not have occurred but for his act, the town was not liable, and requested the court to so instruct the jury. The court, however, charged the jury that, notwithstanding the accident might not have occurred but for the wrongful act of Lawton in not turning to the right of the traveled path, yet if the accident would not have occurred but for existence of the post on the bank or side of the road, the town, if otherwise liable, would not be relieved simply because the wrong-

ul conduct of Lawton concurred in causing the accident or injury. The defendant excepted to this charge, and also to the refusal to charge according to his request, and the jury having returned a verdict for the plaintiffs, now petitions for a new trial, alleging, among other grounds, that the court erred in its instruction and refusal to instruct as stated above.

The instruction of the court to the jury applied to the case at bar the rule adopted in *Hampson v. Taylor*, 15 R. I. 83, 85, a rule supported by numerous cases. In all these cases, however, the cause concurring with the defect in the highway to produce the injury was a natural cause, or pure accident, for which no person was responsible, and not, as in the case at bar, the independent act of a responsible person. Such an act, it is said, arrests causation, being regarded as the proximate cause of the injury, the original negligence being considered merely as its remote cause. As in law it is the proximate and not the remote cause which is regarded, he who is guilty of the original negligence is not chargeable, but redress must be sought from him who directly caused the injury. Perhaps this principle is nowhere more clearly stated than by Wharton in his treatise on the law of negligence. In section 134 he propounds this question: "Supposing that if it had not been for the intervention of a responsible third party the defendant's negligence would have produced no damage to the plaintiff, is the defendant liable to the plaintiff?" and proceeds: "This question must be answered in the negative, for the general reason that causal connection between negligence and damage is broken by the interposition of independent responsible human action. I am negligent in a particular subject-matter. Another person moving independently comes in, and, either negligently or maliciously, so acts as to make my negligence injurious to a third person. If so, the person intervening acts as a non-conductor, and insulates my negligence so that I cannot be sued for the mischief which the person so intervening directly produces. He is the one who is liable to the person injured. I may be liable to him for my negligence in getting him into difficulty, but I am not liable to others for the negligence which he alone was the cause of making operative." And again, in section 999, he remarks: "It has been already seen that the negligence of a third party intervening between the defendant's negligence and damage breaks the causal connection between the two. . . . There is no road that has not imperfections, and if a traveler is

forced against one of these through the negligence of a third party, it is from the latter, and not from the town, that redress must be sought." And see also 2 Thompson on Negligence, p. 1089, sec. 6; *Houfe v. Town of Fulton*, 29 Wis. 296, 307; 9 Am. Rep. 568; *Cuff v. Newark & N. Y. R. R. Co.*, 35 N. J. L. 17, 82; 10 Am. Rep. 205. In *Rowell v. City of Lowell*, 7 Gray, 100, 66 Am. Dec. 464, in which the plaintiff, while passing out of the post-office building, slipped from the steps, which were outside the limits of the street, and for the condition of which the defendant was not responsible, to the sidewalk, and then continued slipping until she fell and was injured, both the steps and sidewalk being so covered with ice as to be slippery and unsafe, and having remained so more than twenty-four hours, the court held the defendant not liable; and in distinguishing the case from *Palmer v. Inhabitants of Andover*, 2 Cush. 600, one of the cases supporting the rule applied in *Hampson v. Taylor*, 15 R. L. 83, 85, said: "We think the only exception to the rule, that the plaintiff cannot recover unless the defect in the highway was the sole cause of the injury, must be one where the contributing cause was a pure accident, and one which common prudence and sagacity could not have foreseen and provided against." In *Kidder v. Inhabitants of Dunstable*, 7 Gray, 104, an action to recover damages for an injury from a defect in a highway, the court says: "The alleged defect in the highway here was a neglect to remove the snow therefrom, and the injury is alleged to have been received by the upsetting of the sleigh in which the plaintiff was traveling upon the road. It appears by the facts stated that the plaintiff, while thus traveling on the road, met Ward Coburn driving a one-horse sled with stakes on the sides, and as Coburn testifies, he believes that as he drove forward, the stakes in his sled struck the top of the back part of the sleigh and overturned it, he having turned to the right as far as he could safely on account of the snow in the road. The defendant, however, contended that the injury was caused wholly or in part by the carelessness or negligence of Coburn, and asked the court to instruct the jury that if such was the case the plaintiff could not recover, and this prayer for instruction was refused. The case stated by the defendant was one of injury resulting from the combined effect of two distinct causes, and one of those proceeding from a third person who would be responsible for any injury he might unlawfully occasion. The court are of the opinion that if this injury was

caused wholly by Coburn, or was the combined result of a defect in the highway and carelessness or negligence on the part of Coburn in driving his vehicle, whereby the stakes in his sled struck the sleigh of the plaintiff and overturned it, the defendants are not chargeable therefor." So, too, in *Shepherd v. Inhabitants of Chelsea*, 4 Allen, 113, the plaintiffs sued for an injury to the plaintiff wife by reason of a defective highway. It was proved or admitted, for the purposes of the trial, that boys had been in the habit of sliding with sleds, without interruption by the city authorities, upon a sidewalk which the defendants were bound to keep in repair, and had made the snow and ice upon it so slippery as to be dangerous; that while the plaintiff wife was walking upon the sidewalk in a dark evening, a boy in sliding ran upon her with his sled and threw her down, whereby she received the injury complained of; that she did not see the boy or sled until she was struck, and by reason of the slippery condition of the sidewalk could not have avoided them if she had seen them coming. The court held, affirming the prior cases of *Rowell v. City of Lowell*, 7 Gray, 100, 66 Am. Dec. 464, and *Kidder v. Inhabitants of Dunstable*, 7 Gray, 104, that as it did not appear that the plaintiff Mrs. Shepherd was injured by the alleged defect in the way, but it was clear that the accident happened in part from the unlawful or careless act of a third person, the action could not be sustained.

The rule above stated is subject to the qualification, that if the intervening act is such as might reasonably have been anticipated as the natural or probable result of the original negligence, the original negligence will, notwithstanding such intervening act, be regarded as the proximate cause of the injury, and will render the person guilty of it chargeable: Wharton on Negligence, sec. 145; 2 Thompson on Negligence, p. 1089, sec. 6; *Lane v. Atlantic Works*, 111 Mass. 136, 139, 141; *Griggs v. Fleckenstein*, 14 Minn. 81; 100 Am. Dec. 199; *Clark v. Chambers*, L. R. 3 Q. B. Div. 827; *Burrows v. March Gas and Coke Co.*, L. R. 7 Ex. 96, 97; *Dixon v. Bell*, 5 Moore & S. 198, 199; *Illidge v. Goodwin*, 5 Car. & P. 190, 192; *Lynch v. Nurdin*, 5 Jur. 797. But we do not think that it can be reasonably held that the town ought to have anticipated, as a probable result of permitting the post to remain by the side of the road, that some one would be forced against it by the wrongful and unlawful conduct of another in keeping the middle of the traveled path, instead of turning to the right of the center of



it, as required by the statute. In *Parker v. City of Cohos*, 10 Hun, 513, affirmed 74 N. Y. 610, the water commissioners of the city of Cohoes, acting under authority of law, made an excavation in one of the streets for the purpose of laying water pipes for public and general use, and in so doing, caused earth to be thrown out along the trench; and also brought into the street a heap of sand for use in the work. At the end of the day, barriers, consisting of planks extending from sidewalk to sidewalk, supported by barrels placed in the street, were erected to prevent vehicles from entering the street. Subsequently some person, without the authority or knowledge of the commissioners, removed one of the barriers, and the plaintiff in the darkness drove through the opening thus made, ran upon the obstruction, and was thrown from his carriage and injured. It was held that the defendant was not bound to anticipate mischievous or wrongful acts on the part of others, and hence was not bound to guard against them. See also *Doherty v. Inhabitants of Waltham*, 4 Gray, 596; *McGinity v. Mayor of New York etc.*, 5 Duer, 674. We think, therefore, that the court erred in refusing to instruct the jury according to the defendant's request and in the instruction given, and that the defendant is entitled to a new trial.

Petition granted.

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**TORTS, LIABILITY FOR. — THE GENERAL PRINCIPLE GOVERNING LIABILITY FOR TORTS** is, that "wrongful acts of independent third persons, not actually intended by the defendant, are not regarded by the law as natural consequences of his wrong, and he is not bound to anticipate the general probability of such acts, any more than a particular act by this or that individual": See *Burt v. Advertiser Newspaper Co.*, 154 Mass. 238, and the cases there cited by Holmes, J., at the end of his opinion.

**TO HOLD A PARTY LIABLE FOR NEGLIGENCE**, there must be a causal connection between the injury and the negligence, and such causal connection must be uninterrupted by the interposition of any independent human agency: *Curtis v. Somerset*, 140 Pa. St. 70; 23 Am. St. Rep. 220. The subject is discussed at length in the note to *Henry v. Dennis*, 93 Ind. 452; 47 Am. Rep. 378.

## DOYLE, PETITIONER.

[16 RHODE ISLAND, 557.]

**CONSTITUTIONAL LAW — DUE PROCESS OF LAW — FOURTEENTH AMENDMENT — HABEAS CORPUS.** — A state statute which authorizes the placing of insane persons in certain hospitals or asylums within the state by their parents, guardians, relatives, or friends, or, if paupers, by the overseers of the poor, upon certificates of their insanity, made by two practicing physicians of good standing, and which provides that when placed in such hospitals or asylums they may be lawfully received and detained therein until discharged in one of the modes provided in the statute, where such statute provides no mode whereof the person confined can avail himself, as of right, in his own behalf, is void, being in conflict with the provision of the fourteenth amendment of the constitution of the United States that no state shall deprive any person of life, liberty, or property without due process of law. "Due process of law" means at least some legal procedure in which the person proceeded against, if he is to be concluded thereby, shall have an opportunity to defend himself, and such statute does not provide for such a procedure. And a person held under the provisions of such statute is entitled to a discharge upon *habeas corpus*.

**HABEAS CORPUS.**

*Charles A. Wilson and Thomas A. Jenckes*, for the petitioner.

*Ziba O. Slocum, Edwin D. McGuinness, and John Doran*, contra.

**PER CURIAM.** This is a petition preferred by the petitioner, as guardian of the person and estate of Michael Gannon, and in behalf of said Gannon, for his delivery from confinement in the Butler Hospital for the Insane. Said Gannon was committed to said hospital upon the application of his wife before the appointment of the petitioner as his guardian, and is detained there under the Public Statutes of Rhode Island, chapter 74, sections 11 and 12. Section 11 authorizes the confinement of insane persons in institutions for the insane within the state by their parents or guardians, and if they have none, by their relatives and friends, subject to the proviso that the superintendent shall not receive any person "without a certificate from two practicing physicians of good standing, known to him as such, that such person is insane." Section 12 provides that the person so committed may be lawfully received and detained until discharged in one of the modes provided by said chapter, none of which, however, can be resorted to by the person confined directly, as of right, in his own behalf.

The petitioner contends that these sections are void, because

they are in conflict with the constitution of the state, article 1, section 10, and with the fourteenth amendment to the constitution of the United States. We will consider the question under said amendment, the provision of the state constitution being narrower in its scope, unless extended by construction. The special clause of the Fourteenth Amendment referred to is this: "Nor shall any state deprive any person of life, liberty, or property without due process of law." The contention is, that sections 11 and 12 of chapter 74 deprive the persons committed under them of their liberty without due process of law. Without attempting to define the exact meaning of the phrase "due process of law," it suffices for the present inquiry to say that it means at least some legal procedure in which the person proceeded against, if he is to be concluded thereby, shall have an opportunity to defend himself. The sections of chapter 74 referred to do not provide such a procedure. The only safeguard against an improper commitment which they afford is the certificate of two practicing physicians of good standing, a certificate which may be given entirely *ex parte*. We are not prepared to say that even so the sections would be void, if they were intended simply for the temporary detention preliminary to or pending a proper judicial inquiry. The right of personal liberty is to be reasonably understood, and there are many restraints which are allowed as consistent with it. Thus the passengers and crew of a ship are liable to restraints other than those which are merely incident to their position on shipboard. They must submit to such restraints as are necessary for due discipline and the general safety. So a man who attends a religious meeting is bound to observe the decorum appropriate thereto, or he may be arrested and removed. The man who is committing or has committed crime may be taken into custody and held for trial. Children may be confined for instruction or punishment. Sick people in the delirium of fever may be held on their beds by force, and lunatics who are dangerous to themselves or others may be shut up in the dangerous periods of their lunacy. The restraints in these instances are simply such as are appropriate to the occasions for them, or necessary to public justice or security. In these and other such instances, too, the writ of *habeas corpus*, or a civil action for damages, is an effectual remedy for any abuse or excess in the restraints imposed: See Cooley's Constitutional Limitations, 339, 340, for other instances of permissible restraint.

The counsel for the respondents direct our attention to the cases of *In re Oakes*, Supreme Judicial Court, Mass., January, 1845, 8 Law Rep. 122, and *Denny v. Tyler*, 8 Allen, 225. In the former case, an aged man was committed to an insane asylum by his son. On *habeas corpus* for his release, the court held that a person who is insane or delirious may be confined, or restrained of his liberty, by his family or others, to such extent or for such time as may be necessary to prevent injury or danger to himself or others, and that the restraint may be in his own house or in a suitable asylum. In the second case, a married woman was committed to an insane asylum by her husband for care and treatment, and the court held that she was not entitled to be discharged on *habeas corpus*, so long as the asylum was well managed and she was subjected to no unusual restraint or improper treatment, and her remaining would tend to her recovery. The commitment in both cases was to a private hospital. In the first, the court found that the person confined was insane, after full inquiry into the facts on testimony. In the second, the fact of insanity does not seem to have been disputed. It does not appear in either case that the person confined was detained under any statute whose constitutionality was questioned, or which precluded inquiry into the fact of insanity on *habeas corpus*.

The peculiarity of our statute is this, that if said sections 11 and 12 be constitutional, any person committed under section 11 "may be lawfully received and detained" under section 12 until he is discharged in one of the modes provided by said chapter 74. He cannot be discharged on writ of *habeas corpus* if the sections be constitutional, since the proper function of the writ of *habeas corpus* is simply to discharge persons who are unlawfully restrained. The modes of discharge provided by chapter 74 are not modes which can be initiated or pursued by the person confined, but depend on the will and action of others. The persons confined may be removed from the institution where they are confined, by the persons who have placed them there, or by the persons who have voluntarily become liable for the expenses of keeping them there: Sec. 13; or the superintendent may discharge them on the application of any relative or friend, with the written approval of the visiting committee of the trustees: Sec. 14. The only other mode is by a commission, appointed by a justice of the supreme court, to inquire into the question of sanity and report thereon, and by the action of

the justice on such report: Secs. 15-18; 29. Such commission, however, is to be appointed, not at the instance of the person confined, but only on application by some other person, who, unless applying under section 29, is required, before the appointment, to pay or secure the payment of the expenses which are sometimes onerous. And moreover, it is provided in express terms that no notice of the pendency of the inquiry before the commission shall be served on the person confined, and that such person shall not have the right to confer with counsel, to produce evidence, or be present at the inquisition. The report of such commission may be more worthy of credit than the mere certificate of two physicians; but inasmuch as the person confined cannot himself initiate the proceeding, or take part in it in any way when initiated by another, we do not see how it relieves sections 11 and 12 of the objection that their effect is to deprive the persons confined under them of their liberty without due process of law. It is not enough to answer that the persons are insane, since whether they are insane is the very question which ought to be determined before they are so completely confined as not any longer to have power to institute proceedings for their own relief, or to be heard and adduce evidence in their own behalf.

The petitioner cites *Portland v. Bangor*, 65 Me. 120, 20 Am. Rep. 681, and *Underwood v. People*, 32 Mich. 1, 20 Am. Rep. 633. The first named was the case of an alleged able-bodied vagrant committed to the work-house, pursuant to a statute of Maine, by warrant of two overseers of the poor, on an *ex parte* hearing. The court held the commitment void under the Fourteenth Amendment, because made without a judicial investigation first had to ascertain whether the charge against the person committed was true, and without giving said person an opportunity to be heard. The case of *Underwood v. People*, 32 Mich. 1, 20 Am. Rep. 633, involved the constitutionality of a statute of Michigan. The statute provided that when, in a trial for murder, the defense of insanity is set up, the jury, if they acquit on that ground, shall so declare in their verdict, and the court shall sentence the accused to confinement in the insane hospital of the state prison until discharged by the governor, on certificate of the circuit judge of the circuit where the trial took place, and of the medical superintendent of the state insane asylum, that he is no longer insane, said certificate to be given upon examination by them, after having been summoned to make it by the prison inspec-

tors. The supreme court of Michigan held that the statute was unconstitutional. The reason more particularly dwelt upon by the court was, that the proceeding contemplated for the discharge was not only inquisitorial and *ex parte*, but could not be set in motion except at the will of the prison inspectors; so that, practically, the liberty of the person confined was left to depend on their pleasure. The case is closely in point. In fact, we do not see how it differs essentially, in the respect noted, from the case at bar. And see also *State v. Ryan*, 70 Wis. 676. Our conclusion is, that the provisions under which the said Michael Gannon is held are unconstitutional, and that the writ should issue.

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**CONSTITUTIONAL LAW — DUE PROCESS OF LAW.** — No person can be lawfully deprived of his liberty except under "due process of law": *Donovan v. Vicksburg*, 29 Miss. 247; 64 Am. Dec. 143; and any statute to the contrary effect is unconstitutional, such as a statute providing that any person charged with being an inebriate shall be arrested and tried before a judge of a court of record, and upon conviction shall be sentenced to imprisonment in any inebriate or insane asylum for a period not exceeding two years, nor less than three months, provided some friend or relative of the inebriate shall execute a bond of one thousand dollars to secure his support during confinement: *State v. Ryan*, 70 Wis. 676. Compare the statutes which have been declared unconstitutional in *Underwood v. People*, 32 Mich. 1; 20 Am. Rep. 633; *Pinkerton v. Verberg*, 78 Mich. 573; 18 Am. St. Rep. 473. Consult also *In re Clayton*, 59 Conn. 510; 21 Am. St. Rep. 128, and note.

**INSANE PERSONS — INQUISITION — NOTICE.** — A lunatic should receive notice of inquisition of lunacy, or be brought before the court in person: *Dutcher v. Hill*, 29 Mo. 271; 77 Am. Dec. 572, and note; *Matter of Blewitt*, 131 N. Y. 541; *Lance v. McCoy*, 34 W. Va. 416.

**HABEAS CORPUS — USE OF THE WRIT.** — *Habeas corpus* is a remedy for every illegal imprisonment: *Commonwealth v. Lecky*, 1 Watts, 66; 26 Am. Dec. 37; *Ex parte Bedard*, 106 Mo. 617.

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## McGUINNESS v. WHALEN.

[16 RHODE ISLAND, 558.]

**MEASURE OF DAMAGES FOR FAILURE OF VENDOR OF LAND TO COMPLETE HIS PURCHASE.** — Where the purchaser at an administrator's sale of real estate refuses to complete his purchase, and the vendor thereupon sells the property for a smaller sum, and brings an action against the first vendee to recover for the breach of his contract, the measure of damages will be the loss of the plaintiff from the default of the defendant, which may or may not be the difference between the two bids and the expense of the second sale. In order to make the vendee liable in *assumpsit* for such difference and expense in case of his default, it should be made a

condition of the sale that in such case the property should be resold, and the vendee held to pay such difference and expense.

**ADMINISTRATOR'S SALE NOT JUDICIAL SALE.** — An administrator's sale is not a judicial sale under the Rhode Island statutes.

**ASSUMPT.** The opinion states the case.

*Edwin D. McGuinness and John Doran*, for the plaintiff.

*Edward D. Bassett*, for the defendant.

**DURFEE, C. J.** The declaration sets forth that at an administrator's sale at auction, held February 28, A. D. 1885, by William W. Nichols, administrator *de bonis non* on the estate of John Charlton, deceased, all the right, title, and interest of the decedent in certain land described was struck off to the defendant for \$3,100 bid by him, said sum being the highest bid therefor; that the defendant paid \$150 down as earnest-money; that afterward, at a time appointed, the administrator was ready with his deed to convey the land in pursuance of the sale, but the defendant refused to accept it and pay over the residue of said \$3,100; that subsequently, on May 26, A. D. 1885, the property was again put up at auction by said administrator and struck off to William H. Washburn for \$2,150, the highest bidder therefor, and conveyed to him for that sum. The declaration then proceeds as follows, to wit: "And the plaintiff avers that on the twenty-first day of November, 1887, he was appointed administrator *de bonis non* of the estate of John Charlton, deceased, in the place and stead of said Nichols, removed, whereby the defendant became liable and promised to pay to the plaintiff the difference between said sum of \$3,100 and the costs of said second auction sale, viz., \$40.17, and the sum of \$2,150, amounting to the sum of \$990.17." The declaration also contains the common money counts. The defendant has demurred to the declaration generally, but both parties have treated the demurrer as if it were simply a demurrer to the special count. We will so treat it.

The question as it has been argued to us is, whether the count is good as a count upon a promise to be implied from the facts alleged. We think not. The contract which the defendant entered into when he made his bid was a contract to pay the price bid by him for the premises upon receiving a deed thereof, and if, on tender of the deed, he refused to complete the payment, he committed a breach of said contract, and laid himself liable to an action upon it for damages. In such action the measure of damage is the loss to the vendor



from the default of the vendee, and it may be that the jury, upon proof of the second sale, would find the damages to be the difference between the two bids and the expense of the second sale, but the question would be purely one of damages, and they would not be shut up to that amount: *McCombs v. McKennan*, 2 Watts & S. 216; 37 Am. Dec. 505. In order to make the vendee liable in *assumpsit* for such difference and expense in case of his default, it should be made a condition of the sale that in such case the property should be resold, and the vendee held to pay such difference and expense.

*Adams v. McMillan*, 7 Port. 73, was a case of real estate sold at auction, and afterwards resold on default by the vendee. The declaration contained a count like the special count here. The court held that where a declaration does not aver, as part of the contract of sale, a condition that the land shall be resold in case of such default, but only alleges the difference in price of the two sales, and as a consequence of the vendee's breach of his contract, a liability on his part to pay that difference, being framed on the supposition that the difference is recoverable as on a contract, and not as unliquidated damages, the declaration will be bad on demurrer: *Robinson v. Garth*, 6 Ala. 204; 41 Am. Dec. 47.

The plaintiff contends that the mode of declaring here used is proper, because the sale was judicial, and in such sales the defaulting vendee is liable for the deficiency on resale, whether the terms of sale so provide or not. An administrator's sale, however, under our statutes, is not a judicial sale, as was decided by Judge Story in *Smith v. Arnold*, 5 Mason, 414, 420. It has been held in Alabama that purchasers at official sales who make default are liable by implied contract for the deficit on resale: *Lamkin v. Crawford*, 8 Ala. 153; *Hutton v. Williams*, 35 Ala. 503, 513; 76 Am. Dec. 297. We do not find the doctrine recognized elsewhere: 2 Freeman on Executions, 2d ed., sec. 818; nor in our opinion can an administrator's sale be regarded as an official sale. In some states the defaulting purchaser is liable for "the deficiency arising on resale" by statute: *Alexander v. Herring*, 54 Ga. 200. We have no such statute. The subject of the sale, under which the question here arises, was real estate, the title to which could not pass to the purchaser without deed. Whether, if the subject had been goods and chattels, the same mode of declaring would have been bad is a question on which we express no opinion.

Demurrer regarded as demurrer to the special count sustained.

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THE DECISION OF THE PRINCIPAL CASE, so far as it implies that a purchaser of property is not liable for a deficiency resulting from a resale, when he has refused to take the property, unless such liability is expressly made a condition of the original sale, is not, in our judgment, sustained by the authorities, and the like remark is, we think, true of the suggestion of the court, that an administrator's sale is neither official nor judicial. The authorities upon the subject, or at least a decisive majority of them, affirm that the right to recover for a deficiency resulting from a resale is an incident attending every kind of a sale, whether chancery, probate, judicial, execution, or private. This is clear from an inspection of the authorities, some of which are cited below. Thus the rule has been applied to chancery sales: *Gray v. Gray*, 1 Beav. 199; *Harding v. Harding*, 4 Mylne & C. 514; *Schaefer v. O'Brien*, 33 Ill. 273; *Hill v. Hill*, 58 Ill. 239; *Ogilvie v. Richardson*, 14 Wis. 157; including those in partition: *Mullikin v. Mullin*, 1 Bland, 542; *Shinn v. Roberts*, 20 N. J. Eq. 435; 43 Am. Dec. 636; to execution sales: *Coffman v. Hampton*, 2 Watts & S. 377; *Robinson v. Garth*, 6 Ala. 204; 41 Am. Dec. 47; to sales by administrators and executors: *Cobb v. Wood*, 8 Cush. 228; *Adams v. McMillan*, 7 Port. 73; *Mount v. Brown*, 33 Miss. 566; 69 Am. Dec. 362; to sales in admiralty: *In re Kate Williams*, 2 Flip. 50; and to auction and other sales, though not made by authority of any court whatsoever: *Sands v. Taylor*, 5 Johns. Ch. 394; 4 Am. Dec. 374; *Girard v. Taggart*, 5 Serg. & R. 19; 9 Am. Dec. 327; *Rosenbaum v. Weeden*, 18 Gratt. 785; 98 Am. Dec. 737; Benjamin on Sales, sec. 788; *Dustin v. McAndrew*, 44 N. Y. 72. From these authorities, as well as from others which might be cited, it is manifest that the mode of resale is one which has been adopted and sanctioned as a means of ascertaining the damages resulting to a vendor from the failure of a vendee to comply with the terms of a sale, and there is no reason in principle, and no foundation in authority, for saying that courts and officers acting by their authority have not the same right to resort to this mode as private individuals proceeding to ascertain and collect damages resulting from the failure of the vendee to comply with contracts of sale.

VENDOR AND PURCHASER — CONTRACT TO PURCHASE — DAMAGES FOR BREACH OF. — The measure of damages, in a suit by the vendor for a breach of a contract to purchase land, is the difference between the contract price and the value of the land at the time of re-entry and abandonment by the vendee, less what has been paid: *Allen v. Mohn*, 86 Mich. 328; 24 Am. St. Rep. 126, and note, where the cases are collected.

EXECUTORS AND ADMINISTRATORS — SALES BY. — Where the will confers a power of sale on the executor, the probate court has no jurisdiction to grant an order for the sale of decedents' lands: *Wilson v. Holt*, 83 Ala. 528; 3 Am. St. Rep. 768. The jurisdiction of orphans' courts, in proceedings for the sale of real estate of a decedent, is derived exclusively from legislation, and unless warranted by statute, such proceedings are *coram non judice*: *Wyman v. Campbell*, 6 Port. 219; 31 Am. Dec. 677, and note.

## **OLNEY v. CONANICUT LAND COMPANY.**

[16 RHODE ISLAND, 397.]

**DIRECTORS OF INSOLVENT CORPORATION TRUSTEES FOR CREDITORS, AND DEBARRED FROM PREFERRING DEBTS DUE TO THEMSELVES.** — The directors of an insolvent corporation are trustees for the creditors of such corporation, and are therefore debarred in equity, by virtue of their positions, from preferring debts due to themselves from the corporation. And a mortgage given by a corporation, while insolvent, to its directors, to secure debts due from it to them, will not be allowed priority over a person having, at the time of the execution of such mortgage, a claim against the corporation for damages for its negligence, upon which suit had been commenced, and which afterwards ripened into a judgment.

**BILL** in equity to annul a mortgage, and for a receiver.

*Daniel R. Ballou and Frank H. Jackson*, for the complainants.

*Darius Baker and Rathbone Gardner*, for the respondents.

**STINESS, J.** The complainants, judgment creditors of the Conanicut Land Company, seek to set aside a mortgage given to the defendants Lippitt, Davis, and Bradford, to secure them for advances, and for their indorsements of the notes of the company. The mortgage was given immediately after the complainants had brought suits for damages against the company for negligence, and when the company was insolvent; the agreed statement of facts showing that it had not sufficient assets with which to discharge all its outstanding indebtedness, were payment of the same to be demanded when due. Since then the complainants have levied execution on the property of the company. The complainants claim that as the mortgagees are three of the four directors who voted to give the mortgage, thereby securing themselves, their action is so inconsistent with their fiduciary relation that it should be set aside. No fraudulent act in regard to the giving of the mortgage is alleged, other than the fact itself; and the case being submitted on bill, answer, and agreed facts as to the validity of the mortgage, we have the simple question whether directors of an insolvent corporation are debarred in equity, by virtue of their positions, from preferring debts due to themselves. In so far as the mortgage is to be regarded as a mere preference, it is not contended that it is invalid. Except as limited by statute, the right of a debtor to prefer a part of his creditors has always been upheld in this state: *Dockray v. Dockray*, 2 R. L. 547; *Elliott v. Benedict*, 13 R. L. 468. The

vital question is, whether a director of an insolvent corporation is to be regarded as a trustee for its creditor. If he is so, the duty of a trustee to a *cestui que trust* is plain. For a trustee to collect his own debt, to the detriment of that of his *cestui*, is a clear breach of fidelity. When one accepts the trust of caring for another's interest, he accepts the attendant duty. It must be admitted that directors of a corporation are not technical trustees. They do not have in themselves the title to property which they hold for the benefit of others; and certainly, as to creditors, they are under no express trust. The corporation is a legal being, distinct from its stockholders and officers. It may deal with them as individuals, and may owe them debts. It holds its own property, and has the capacity and responsibility of acting for itself. Nevertheless, the conduct of its affairs must, of necessity, be intrusted to officers in whom confidence is reposed, to whom large powers are given, and by whom its property is managed for the common benefit. As corporations have multiplied, and have become so greatly concerned in business affairs in recent years, the obligations arising from such a relation have become correspondingly prominent. While the decisions in regard to this relation are not harmonious, it has been generally agreed that directors are trustees for stockholders. This being established, we think it follows naturally that when the corporation becomes insolvent, and the stockholders have no longer a substantial interest in the property of the corporation, directors should be regarded as trustees of the creditors to whom the property of the corporation must go. If directors, with their office, assume the duty of caring for the interests of the stockholders, why do they not also assume the duty incidentally of caring for the interests of those who, instead of the stockholders, may come to have claims upon the corporate property?

In speaking of directors as trustees for stockholders, Mr. Justice Miller, in *Sawyer v. Hoag*, 17 Wall. 610, calls this "a doctrine of modern date"; but as long ago as the time of Lord Hardwicke we find the duties and obligations of a director of a corporation thus clearly set forth: "I take the employment of a director to be of a mixed nature; it partakes of the nature of a public office, as it arises from the charter of the crown. But it cannot be said to be an employment affecting the public government. Therefore committeemen are most properly agents to those who employ them in this trust, and who empower them to direct and superintend the affairs

of the corporation. By accepting a trust of this sort, a person is obliged to execute it with fidelity and reasonable diligence; and it is no excuse to say that they had no benefit from it but that it was merely honorary; and therefore they are within the case of common trustees": *Charitable Corporation v. Sutton*, 2 Atk. 400. To the effect that officers of a corporation are trustees for the stockholders, see *Hodges v. New England Screw Co.*, 1 R. I. 812; 58 Am. Dec. 624; *Hoyle v. Plattsburgh & Montreal R. R. Co.*, 54 N. Y. 814; 13 Am. Rep. 595; *Kochler v. Black River Co.*, 2 Black, 715; *York and North Midland Railway Co. v. Hudson*, 16 Beav. 485; 19 Eng. L. & Eq. 861; *Great Luxembourg Railway v. Magnay*, 25 Beav. 586; *Hope v. Valley City Salt Co.*, 25 W. Va. 789. Indeed, no cases that we know of deny a fiduciary relation of directors to stockholders, however they may differ in the use of terms to describe it. This relation has led logically to the conclusion that in case of insolvency, the assets of the corporation being no longer held for the benefit of stockholders, but for the benefit of creditors, the directors owe to the creditors the duty of a trustee. This duty is clearly stated by Clifford, J., in *Bradley v. Converse*, 4 Cliff. 375: "Assets of an incorporated company are regarded in equity as held in trust for the payment of the debts of the corporation, and courts of equity will enforce the execution of such trusts in favor of creditors, even when the matter in controversy may not be cognizable in a court of law. Such assets are usually controlled and managed by directors or trustees, but courts of equity will not permit such managers, in dealing with the trust estate, in the exercise of the powers of their trust, to obtain any undue advantage for themselves, to the injury or prejudice of those for whom they are acting in a fiduciary relation. Exact equality of benefit may be enjoyed, but the trustees are forbidden to protect, indemnify, or pay themselves at the expense of those who are similarly in relation to the same fund."

To the same effect are *Bradley v. Farwell*, 1 Holmes, 433; *Jackson v. Ludeling*, 21 Wall. 616; *Corbett v. Woodward*, 5 Saw. 403; *Stout v. Yaeger Milling Co.*, 13 Fed. Rep. 802; *Haywood v. Lincoln Lumber Co.*, 64 Wis. 639; *Richards v. New Hampshire Ins. Co.*, 43 N. H. 263; *San Francisco & North Pacific R. R. Co. v. Bee*, 48 Cal. 398; *Gaslight Improvement Co. v. Terrell*, L. R. 10 Eq. 168; *Hopkin's and Johnson's Appeal*, 90 Pa. St. 69. Of the cases cited by the defendants, only three fully

sustain their claim, that, as creditors of the company, directors may, in the absence of fraud, secure themselves for their own debt, viz.: *Burr's Ex'rs v. McDonald*, 3 Gratt. 215; *Planters' Bank of Farmville v. Whittle*, 78 Va. 737; *Garrett v. Burlington Plow Co.*, 70 Iowa, 697; 59 Am. Rep. 461.

In the case of *Central R. R. & B. Co. v. Claghorn*, 1 Speer Eq. 545, 562, frequently cited upon this point, the mortgage in question was not given to, nor was the suit brought against, directors; neither did the court find that the company was insolvent when the mortgage was given. The case depended mainly on a statute. In *Stratton v. Allen*, 16 N. J. Eq. 229, 232, the court expressed no opinion upon the point taken, that the defendant was a trustee by virtue of his office as director, but did hold that he was not entitled to priority, but must share proportionately with other creditors. This case also depended upon a statute.

In *Buell v. Buckingham*, 16 Iowa, 284, 85 Am. Dec. 518, Judge Cole stated there was no evidence that the company was insolvent. Judge Dillon conceded that directors are trustees for stockholders, and treats the case as a sale voidable between trustee and *cestui que trust*, to which a subsequent attaching creditor, having no lien upon the property at the time, could not make objection. *Garrett v. Burlington Plow Co.*, 70 Iowa, 697, 59 Am. Rep. 461, depended upon this and other cases in Iowa, which had followed its apparent doctrine. In *Burr's Ex'rs v. McDonald*, 3 Gratt. 215, the question was not discussed upon principle or authority. In *Planters' Bank of Farmville v. Whittle*, 78 Va. 737, the question was elaborately discussed. The cases upon which the court relied were *Central R. R. & B. Co. v. Claghorn*, 1 Speer Eq. 545, 562, *Stratton v. Allen*, 16 N. J. Eq. 229, 232, and *Buell v. Buckingham*, 16 Iowa, 284, 85 Am. Dec. 518, to which we have referred; also *Ashhurst's Appeal*, 60 Pa. St. 290, which was a suit by stockholders, denied on account of laches and absence of fraud, the court saying: "Creditors could have avoided what was done, but the complainants are not claiming as creditors or through creditors"; *Smith v. Skeary*, 47 Conn. 47, in which the company was supposed to be solvent at the time of the transaction complained of; also *Gordon v. Preston*, 1 Watts, 885, 26 Am. Dec. 75; *Whitwell v. Warner*, 20 Vt. 425, and *Sargent v. Webster*, 18 Met. 497, 46 Am. Dec. 748, in neither of which cases was this subject treated of at length, or as an important element of the case.

We think the weight of recent authority regards directors of an insolvent corporation as trustees for creditors, and that this authority stands upon the better reason. If, as Judge Dillon said, the right to collect a debt is "a race of diligence," open alike to both, it must be admitted that it is a race in which the outside creditor is unduly handicapped. The parties do not contend upon an equal footing; and although it is said that the director has only an advantage which results from his position, and which is known to all who deal with the corporation, yet no one would say that an ordinary trustee should be entitled to an unequal start with his *cestui*, by means of information received in the discharge of his trust. If, then, the director be a trustee, or one who holds a fiduciary relation to the creditors, in case of insolvency he cannot take advantage of his position for his own benefit, to their loss. The right of the creditor does not depend upon fraud or no fraud, but upon the fiduciary relation.

It is claimed by the defendants that it was agreed they should have security before the company became insolvent, and that this mortgage was given pursuant to such agreement. We do not think this claim is supported. The answer sets out that in January, 1874, the stockholders authorized the treasurer to execute a mortgage to secure certain directors who indorsed the notes of the company; but nothing was done under this vote. November 22, 1877, the stockholders again voted a mortgage to secure the then directors and indorsers, in a sum not exceeding thirty thousand dollars, which mortgage was given, December 4, 1880, in order to raise from a stranger a new loan of fifteen thousand dollars upon mortgage, which was to be a first lien upon the property of the company. The directors, two of whom were persons not now directors nor parties to this suit, canceled and discharged their mortgage upon the agreement for new security as aforesaid. This loan was increased, in January, 1884, to twenty-three thousand dollars, and a new mortgage given. It is not shown, however, that the company made such an agreement. No vote of the company is recited or put in evidence; the directors had no authority under the by-laws to make such an agreement, and it does not appear what would have been the total amount of indebtedness. If the proceeds of the new mortgages paid all the debts of the company, there was nothing due the directors, and their mortgage was properly discharged, with no occasion for such an agreement. If they



still held debts, such debts may have gone above the limit placed in the resolution. But however this may have been, no mortgage was given or demanded during a period of about eight years. In January, 1884, the company adopted by-laws which gave the directors full power to mortgage the corporate property; but for more than four years after this no demand for a mortgage was made, nor did the directors vote to give one. In the absence of an express agreement, we think the directors had no right, after they became aware of the unprofitable and disastrous state of the affairs of the company, to appropriate its entire property to secure themselves. But they say the complainants were not creditors, whose rights they could consider, at the time of the mortgage. True, they had not reduced their claims to judgment; but the claims existed, and the defendants had notice of them by the commencement of suits. As trustees for creditors, we think the directors were as much bound to care for those who had given them notice of their claims by suits, in case they should succeed in obtaining judgments, as for those whose claims had been already ascertained. Their action was taken with full knowledge that these claims might ripen into judgments entitled to payment from the property of the company. We fail to see that it was any less the duty of the directors to protect these liabilities of the company than those arising upon contracts which the holders were not prosecuting to judgment. If it be said there is a difference, because of a presumption that contracts are made upon the trust and confidence reposed in the directors, it may also be presumed that, with equal trust and confidence in them, the complainants became guests of the hotel, assuming that they would not, through negligence, allow it to become dangerous to life and health.

Our conclusion is, that in view of the fiduciary relation of the directors to the creditors of the company, they are not entitled to priority over the complainants by virtue of their mortgage.

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**CORPORATIONS — DIRECTORS — CONTROL OF ASSETS BY.** — The directors of an insolvent corporation are trustees of its assets for its creditors, and cannot receive any advantage or preference in the payment of their claims at the expense of other creditors: *Beach v. Miller*, 130 Ill. 162; 17 Am. St. Rep. 291, and extended note; *Goodin v. Cincinnati etc. Canal Co.*, 18 Ohio St. 169; 98 Am. Dec. 95, and note; *Wickersham v. Orittenden*, 93 Cal. 17; *Tobin Canning Co. v. Fraser*, 81 Tex. 407. Where the debt of a corporation beyond the limit prescribed by charter was held by its directors, and they, in good faith, took a mortgage of its property as security, they may enforce such a

curity though it was their fault in permitting the accumulation of the debt, and though the corporation was insolvent when the mortgage was taken, and the mortgage gave them a preference over other creditors: *Garrett v. Burlington Plow Co.*, 70 Iowa, 697; 59 Am. Rep. 461, and extended note.

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## CARR, PETITIONER.

[16 RHODE ISLAND, 645.]

**TESTAMENTARY POWER OF SALE DOES NOT GIVE POWER TO MAKE PARTITION.** Nor will a power to make partition be implied from a power of sale, merely because a sale can be more advantageously made after partition.

**CASE** stated for an opinion of the court.

*Darius Baker*, for Annie Carr and children.

*Francis B. Peckham and Charles A. Ives*, for the other petitioners.

**DURFEE, C. J.** The case stated shows that John F. Carr, late of New York, deceased, was, when he died, seised and possessed, in common with Silas Carr, Isaac P. Carr, Eunice Littlefield, George F. Carr, and Stephen G. Carr, of a large and valuable tract of land in the town of Jamestown in this state; that said John F. duly devised his share to his widow, Annie Carr, one half thereof to her individually, and the other half to her as trustee for her children; that said Annie and her co-tenants, before named, desire to have said land divided, to the end that they may hold and enjoy their shares more satisfactorily, and that said Annie may be able to sell her part the more advantageously for herself and her children, agreeably to said will; that they have agreed to a just and equitable partition, which, to avoid the expense of a suit in partition, they desire to carry into effect, but that a question has arisen whether said Annie has power under the will to agree to the same, and to make the conveyances necessary to complete it. They ask us to decide the question; the children, who are minors, having been made parties by said Annie acting for them as their next friend. The clauses of the will that bear on the question follow.

“*Second.* It is my wish and direction that my said executrix shall, and I authorize her to, as soon as she may deem it advisable, wind up and liquidate my business interests, either at public or private sale, and on such terms as she may deem

proper, and sell and convert all my property into money, and may make and execute all necessary or proper transfers thereof.

“*Third.* I give, devise, and bequeath unto my beloved wife, Annie Carr, one half of all my estate, real and personal, for her own use and that of her heirs and assigns forever.

“*Fourth.* I give, devise, and bequeath unto my said wife the other half of all my estate, real and personal, in trust, to convert the same into money, as hereinbefore provided, and to collect the rents, profits, and income of said one half until so converted into money, and when so converted, then to keep the proceeds invested on good and solvent interest-bearing securities, and collect the interest and income thereof, and apply such rents, profits, income, and interest to the support, maintenance, and education of our children”; and, as further directed, to divide the said half among the children equally.

The only power given expressly by the will which can be claimed to authorize the partition is the power to sell, and the counsel for the trustee contends that said power does authorize it. He does not cite any case which so decides, but he contends that there is no case to the contrary: *McQueen v. Farquhar*, 11 Ves. Jr. 467, decided by Lord Eldon, A. D. 1806, is, if we understand it, directly to the contrary. Lord St. Leonards, in his treatise on powers, says that Lord Eldon, in that case, “determined that a power of sale simply does not authorize a partition, whatever a power of exchange may do; and in a much later case he expressed the same opinion”: 2 Sugden on Powers, 480. This case has generally been regarded as settling the point. Lewin, Hill, and Perry, in their treatises, say a power to sell simply does not authorize partition; citing *McQueen v. Farquhar*, 11 Ves. Jr. 467, as authority: 1 Lewin on Trusts, 427; Hill on Trustees, 475; 2 Perry on Trusts, sec. 769.

In *Brassey v. Chalmers*, 16 Beav. 228, power was given to trustees of real estate “to sell and dispose thereof at their discretion,” the purchasers not to be required to see to the application of the purchase-money. The case was heard before Sir John Romilly, master of the rolls. His opinion was, that the power was a mere power to sell, the words “dispose thereof” being surplusage, and that it did not authorize partition. The case was one in which the trustees had already concurred in a partition. It was taken by appeal to the high court of chancery, and there, at the suggestion of Lord Jus-

tice Knight-Bruce, a partition suit was brought, and partition was decreed in accordance with the partition previously concurred in by the trustees, the same having been shown to be beneficial to the *cestuis que trustent*. The question was thus evaded, but the marginal note is: "*Semble*, that a devise on trust to sell and dispose of property consisting partly of an undivided share does not authorize the trustees to concur in a partition."

In *Phelps v. Harris*, 101 U. S. 370, cited by the counsel for the trustee, the question was, whether, under a devise of land to a trustee with power "to dispose of all or any portion of it," the trustee was authorized to concur in a partition. The court, following the court of the state where the land was, held that he was authorized. The ground of decision was, that while a power "to sell and dispose of" might be construed to be merely a power to sell, a power "to dispose of," without such qualification, might extend to a disposal by exchange as well as by sale, and if by exchange, then by partition, which is a species of exchange. "The word," said Mr. Justice Bradley, "is *nomen generalissimum*, and, standing by itself without qualification, has no technical signification. Taking the whole clause in the codicil together, it is equivalent to an authority to dispose of the property as the trustee should deem most for the interest of his children; and this would include the power to barter or exchange as well as the power to sell." The object was to show that a power to dispose of was broader than a power to sell, it being assumed that a power to sell was insufficient. In *Phelps v. Harris*, 51 Miss. 789, the court held that partition, though not authorized by a power to sell, is by a power to exchange. Though long in doubt, it seems now to be settled that a power to exchange does authorize a partition, a partition being in effect an exchange: *In re Frith and Osborne*, L. R. 3 Ch. Div. 618; *Doe dem. Knight v. Spencer*, 2 Exch. 752; *Phelps v. Harris*, 101 U. S. 370, 377. But it has been held that a power to sell does not authorize an exchange: 2 Perry on Trusts, sec. 769; *Ringgold v. Ringgold*, 1 Har. & G. 11; 18 Am. Dec. 250; *Taylor v. Galloway*, 1 Ohio, 232; 18 Am. Dec. 605.

The counsel for the trustee calls our attention to the fact that the language in which the power to sell is conferred makes it the duty of the trustee to sell, and contends that, this being so, she has power to join in making partition, because she can sell to better advantage after partition is made.

If it were necessary to make partition in order to sell, doubtless a power to make it might be implied, but we are not satisfied that it can be implied simply because it may be advantageous. The same argument was urged in *Brassey v. Chalmers*, 16 Beav. 228, but the master of the rolls was of opinion that the power was not implied, and could not be imported into the will by construction.

The counsel for the trustee contends that, under her power of sale, she and her co-tenants can make partition, by her selling to them her interest in the part which goes to them under their agreement, and purchasing their interest in the part which comes to her, and that if she can so make partition indirectly, she can do it directly in the usual way. The mode was suggested by Lord Rosslyn, A. D. 1793, in *Abel v. Heathcote*, 2 Ves. Jr. 101, though there the power was not simply to sell, but to sell or exchange. It has never since then been decided that a power to sell will authorize partition directly as such, though the point has been urged: *Brassey v. Chalmers*, 16 Beav. 228; *Attorney-General v. Hamilton*, 1 Madd. 214, 223. We do not think it follows, because the same result can be reached circuitously by one power, and directly by another which is entirely different, that if the former power be given, the latter may be used. It will be observed, too, that the trustee, in order to effect partition in the mode suggested, has to purchase as well as to sell, and the will gives her power, not to purchase real estate, but only to sell and invest the proceeds in good interest-bearing securities. We do not think the argument can prevail.

It has been argued in some of the cases that the co-tenants can enforce partition against the trustee by suit, and that she should have power to do voluntarily what she can be compelled to do. But the partition which is made in a partition suit is the work of the law. The argument has not prevailed. The trust attaches to the trustee's undivided share in every part of the trust estate, and according to the authorities, can only be transferred or converted by the exercise of some power conferred upon the trustee.

Our opinion is, that Annie Carr has not power under the will to join with the co-tenants in voluntarily executing the partition agreed upon between them.

Order accordingly.

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**POWERS.** — DIRECTIONS IN A POWER OF SALE must be strictly pursued, and a deviation in the execution of the power will invalidate the sale: *Seare*

v. *Livermore*, 17 Iowa, 297; 85 Am. Dec. 564; *Oranstone v. Orane*, 97 Mass. 459; 93 Am. Dec. 106. Thus it has been generally held that a power of sale does not authorize the transfer of the property of the principal in payment of a debt: *Durham v. Oddie*, 1 Martin, N. S., 444; 14 Am. Dec. 190. *Contra*, see *Stokes v. Stokes*, 66 Miss. 456, where it was held that a will conferring on an executor authority to "sell and dispose of the property bequeathed in the will, when it should appear to him advisable to do so, having an eye to the support and education of the children," the executor may convey a portion of the lands devised in discharge of a valid debt of the testator.

POWER OF SALE CONTAINED IN A WILL, though expressed in the most general terms as to the time for its exercise, cannot be further exercised, if the purpose for its creation appears, and that purpose has ceased: *Wilkinson v. Buist*, 124 Pa. St. 253; 10 Am. St. Rep. 580.

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## BARRETT v. DODGE.

[25 RHODE ISLAND, 740.]

PROMISSORY NOTE, LAW OF PLACE WHERE MADE DETERMINES CONSTRUCTION OF, WHEN. — If no particular place of payment is specified in a promissory note, the law of the place where it is made determines not only its construction, but also the obligation and duty it imposes upon the maker. And the maker may, therefore, avail himself of any equitable defenses given to him by the law of the place where the note was made.

PLACE OF DELIVERY OF NOTE DEPOSITED IN THE MAILS. — The place where a note is made is not the place where it is written, signed, and dated, but the place where it is delivered. Where, therefore, a promissory note is drawn by the payee in Baltimore and forwarded to the maker in New York, where it is signed by him and returned by mail to Baltimore, such note is to be deemed as made in New York. By depositing the note in the mail with the intent that it shall be transmitted to the payee in the usual way, the maker parts with his dominion and control over it, and the delivery is in legal contemplation complete.

NEWLY DISCOVERED EVIDENCE NOT GROUND FOR NEW TRIAL, WHEN. — A new trial will not be granted on the ground of newly discovered evidence, where the moving party fails to show that he could not, by the exercise of reasonable diligence, have discovered such evidence in season to have used it on the trial, and does not state any excuse for not having then produced it.

ASSUMPSIT. The opinion states the case.

*Elisha C. Mowry*, for petitioning plaintiff.

*George B. Barrows*, for the defendant.

MATTESON, J. This is an action of *assumpsit* on two promissory notes. The first is for \$1,106.12, dated at New York, December 28, 1886, and made payable to the order of William E. Dodge and Son, twelve months after date. The second is for

two hundred dollars, dated at Baltimore, Maryland, January 27, 1887, and also made payable to the order of William E. Dodge and Son, four months after date, with interest at six per cent per annum. The plaintiff claimed that both notes were indorsed and delivered to him by the payees before maturity, for their full value, on account of his guaranty of the indebtedness of the payee to Barrett Brothers & Co., of which firm the plaintiff was a member. The defense was, that the notes were so indorsed and delivered after maturity, and that the note for \$1,106.12 had been renewed for another year, which had not elapsed at the bringing of the suit; and that the \$200 note had been paid, or satisfied, by the terms of a written agreement between the defendant and the payees, made contemporaneously with the note. The case was tried in this court and resulted in a verdict for the defendant. The plaintiff moves for a new trial for alleged misrulings.

At the trial the plaintiff called as a witness Fred. A. Dodge, of the firm of William E. Dodge and Son, the payees of the notes, who testified: "Shortly after the \$1,106.12 note was received, and before maturity, about the time it was received, we indorsed and assigned it over to George P. Barrett, the plaintiff, for its face value, on account of our indebtedness to Barrett Brothers & Co., for which he was our guarantor." In cross-examination of this witness, the court, against the plaintiff's objection, permitted a letter written by the witness to be read to the jury, of which the following is a copy of the material portion: —

"BALTIMORE, MD., January 8, 1888.

"O. G. DODGE, JR., 214 W. 55th St., N. Y.

"*Dear Sir,*—Inclosed please find note, which please sign and return. Your note due 31st ult. was for \$1,106.12; \$63.88, twelve months' interest, \$1,172.50. We made no demand for it, as we knew you were in bad shape. . . .

"WM. E. DODGE AND SON."

The plaintiff excepted to the ruling permitting the reading of the letter. We do not think the court erred. If the testimony of the witness in his direct examination, that the note in question had been indorsed or assigned to the plaintiff soon after it was given, nearly a year before the letter was written, was correct, it might be regarded as a somewhat unusual proceeding for him to have written the letter inclosing the new note in renewal of the old, and excusing the failure to make a demand upon the old note when it became due. It



was precisely such a letter as William E. Dodge and Son might have written had they continued to be the owners of the note. It therefore, in view of the direct testimony of the witness, called for explanation, and if not satisfactorily explained, would be likely to affect the judgment of the jury in relation to the credibility of the witness. We think, therefore, that it was properly admitted in cross-examination of the witness, for the purpose of affecting his credibility.

The court in its charge to the jury instructed them that both the notes declared on were to be considered by them as subject to the equities between the payees and the maker, according to the law of New York, as set forth in the decisions of the court of that state which had been put in evidence, and not according to the law of Maryland or of this state. To this instruction the plaintiff duly excepted.

The evidence shows that the notes were drawn by Fred. A. Dodge, in Baltimore, and were sent by him to the defendant in New York for his signature; that the defendant signed them in New York and returned them to the payees by mail. No particular place of payment is specified in either note. The authorities agree that if no particular place of payment is specified in a note, or if, in other words, it is payable generally, the law of the place where it is made determines not only its construction, but also the obligation and duty it imposes on the maker. And therefore the maker may avail himself of any equitable defenses given to him by the law of the place where the note is made: *Story on Promissory Notes*, sec. 172; 2 *Parsons on Notes and Bills*, 318, 338, 358; *Stacy v. Baker*, 1 *Scam.* 417; *Evans v. Anderson*, 78 *Ill.* 558; *Young v. Harris*, 14 *B. Mon.* 556; 61 *Am. Dec.* 170; *Allen v. Bratton*, 47 *Miss.* 119. But by the place where the note is made is not meant the place where it is written, signed, and dated, but the place where it is delivered, delivery being essential to its consummation as an obligation. So long as it remains in possession of the maker, he is under no obligation whatever by reason of it, and it becomes binding upon him only when he has parted with its dominion and control by delivering it to the payee: *Freese v. Brownell*, 35 *N. J. L.* 285; 10 *Am. Rep.* 239; *Hopper v. Eiland*, 21 *Ala.* 714; *Chamberlain v. Hopps*, 8 *Vt.* 94; *Marvin v. McCullum*, 20 *Johns.* 288. The correctness of the instruction complained of depends, therefore, upon whether the notes are to be regarded as having been delivered in New York or Baltimore. We

think they are to be regarded as delivered in New York. They were sent, as has been stated, by the payees in Baltimore to the maker in New York for his signature. In the absence of instruction to the maker as to the mode by which he should return them when signed, the payees must have contemplated that the maker would return them by the natural and ordinary mode of transmitting such obligations, and must be deemed to have authorized him to so return them. The natural and ordinary mode of transmitting them was by mail, the mode adopted by the maker. In such cases the post-office may be regarded as the common agent of both parties: of the maker for the purpose of transmitting the note, and of the payee for the purpose of receiving it from the maker. By depositing the note in the mail, with the intent that it shall be transmitted to the payee in the usual way, the maker parts with his dominion and control over it, and the delivery is in legal contemplation complete: *Kirkman and Luke v. Bank of America*, 2 Cold. 897; *Household, Fire, and Carriage Accident Ins. Co. v. Grant*, L. R. 4 Ex. Div. 216; *MacLay v. Harvey*, 32 Am. Rep. 40, note; *King v. Lambton*, 5 Price, 428; 1 Addison on Contracts, 18, and cases cited in note.

The plaintiff also moves for a new trial on the ground that the verdict is against the evidence, and the weight thereof. The testimony in behalf of the plaintiff in relation to the indorsement and delivery of the notes to him as security for his guaranty of the indebtedness of the payees to Barrett Brothers & Co., it is true, was not contradicted; but it also appears from the plaintiff's own testimony that he knew the defendant was in poor circumstances when he took the notes as security, that he made no attempt to collect them when due, neither making demand on the maker nor notifying the indorsers, because he says he knew they were unable to pay them. And it further appeared that neither the books of William E. Dodge and Son, nor those of Barrett Brothers & Co., contained any entries with reference to the notes. And as affecting the credibility of the witnesses, William E. Dodge and Fred. A. Dodge, it appears that William E. Dodge and Son had written several letters to the defendant, without the knowledge or authority of the plaintiff, although the relations between them and the plaintiff were intimate, after the notes, as it was claimed, had passed into the ownership of the plaintiff, which letters, it was argued by the defendant, were inconsistent with the plaintiff's ownership of the notes as testified by the witnesses, and were

consistent only with the theory that they were, at the time the letters were written, still the property of the payees. The jury had the right to consider all these matters, as well as the conduct and appearance of the witnesses in testifying, in weighing the testimony, and had the right to reject the testimony of any witness, though uncontradicted, which did not commend itself to them as reasonable or probable, in view of the whole testimony, and of their knowledge or experience of the ordinary conduct of men in similar circumstances. Moreover, it did not appear that, up to the bringing of the suit, the plaintiff had ever been called upon to pay or had paid any portion of the indebtedness of William E. Dodge and Son to Barrett Brothers & Co., under his guaranty, or that the guaranty imposed any legal liability on the plaintiff for such indebtedness. We cannot say that the verdict was not authorized by the evidence.

The plaintiff also moves for a new trial on the ground of newly discovered evidence, the newly discovered evidence consisting of the copy of a letter in the letter-book of Barrett Brothers & Co., written by the plaintiff to the defendant November 29, 1887, notifying him that the plaintiff held the \$1,106.12 note, and requesting the defendant to pay it. The plaintiff in his affidavit says that since the trial, and since the filing of his motion for a new trial, he accidentally discovered the copy. He does not set forth that he could not, by the exercise of reasonable diligence, have ascertained the existence of the copy in season to have used it on the trial, nor any excuse for not having then produced it. The cross-examination of William E. Dodge and Fred. A. Dodge, on the taking of their depositions prior to the trial, was notice to the plaintiff that his title to the notes, as a *bona fide* purchaser for value before maturity, was disputed, and it was therefore incumbent on him to be prepared to sustain his claim at the trial by all the evidence in his control. We do not think he brings himself within the rule justifying the granting of a new trial on the ground of newly discovered evidence.

Petition dismissed.

Subsequently the plaintiff filed a motion for a reargument of his petition. This was heard, and the court affirmed its decision above given.

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NEGOTIABLE INSTRUMENTS — LAW OF PLACE. — Where no particular place of payment is designated (*Clark v. Searight*, 135 Pa. St. 173; 20 Am. St. Rep. 868), the *lex loci contractus* determines the validity of a note: *Fessenden v. Taft*,

65 N. H. 39; and also governs the construction to be put upon the instrument: *Curtis v. Planters' Nat. Bank*, 87 Va. 651; 24 Am. St. Rep. 673; as well as the duties and obligations growing out of it: *Peck v. Hubbard*, 26 Vt. 606; 62 Am. Dec. 606.

**NEGOTIABLE INSTRUMENTS—PLACE OF CONTRACT.**—The place where a note is delivered must be deemed the place where it is made: *Hart v. Will*, 52 Iowa, 56; 35 Am. Rep. 255; *Bell v. Packard*, 69 Me. 105; 31 Am. Rep. 251. Compare *Bryant v. Edison*, 8 Vt. 325; 30 Am. Dec. 472; *Milliken v. Pratt*, 125 Mass. 374; 28 Am. Rep. 241; *Staples v. Nett*, 128 N. Y. 403; 28 Am. St. Rep. 492.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**SOUTH CAROLINA.**

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**STATE v. WHITE.**

[24 SOUTH CAROLINA, 59.]

**NEW TRIAL, REFUSAL OF MOTION FOR, NOT CONSIDERED ON APPEAL, WHEN.**

— Where the “case” on appeal fails to show the ground upon which the trial judge refused a motion for a new trial, the supreme court is not bound to consider the appeal.

**IDEM SONANS, “CANADA” AND “KENNEDY” ARE, WHEN.** — In describing persons other than the accused in an indictment for larceny, certainty to a common intent is all that is necessary. And where, in such an indictment, the name of the owner of the stolen goods is laid as Canada McCutchen instead of Kennedy McCutchen, and the defendant is not thereby misled in preparing his defense, the variance is not fatal, Canada and Kennedy being *idem sonans*.

**INDICTMENT for larceny.** The opinion states the case.

*Trenholm and Rhett*, for the appellant.

*Jervey*, solicitor, contra.

**McIVER, J.** The defendant was found guilty of larceny, under an indictment which charged him with having stolen the goods of Kennedy McCutchen, and having been convicted, he moved for a new trial before the circuit judge, on the ground that there was a fatal variance between the *allegata* and *pro-bata*, inasmuch as the proof showed that the goods alleged to have been stolen were the property of Canada McCutchen. His motion having been refused, he brings this appeal upon the same ground. Inasmuch as there is nothing in the “case” which shows the ground upon which the circuit judge refused the motion, it might be sufficient to dispose of this appeal to say that for all that we know (from the record) the circuit

judge might have refused the motion upon the ground that, in his judgment, the proof did not show that the goods belonged to Canada McCutchen, but, on the contrary, that they were the property of Kennedy McCutchen; and if so, then this court clearly could not overrule this finding of fact by the circuit judge. But inasmuch as the solicitor, very properly no doubt, makes no such point here, we will proceed to consider the case just as if the circuit judge had held that though the proof did show that the goods belonged to Canada McCutchen, and the allegation was that they were the property of Kennedy McCutchen, there was no such variance as would be fatal; and we will proceed to consider whether there was any error in such ruling.

While it is undoubtedly the rule that an indictment for larceny must allege the name of the owner of the stolen goods, unless, perhaps, where the owner is unknown, which need not be considered here, yet an equally well-settled rule is, that in describing persons other than the accused, in an indictment, "certainly to a common intent" is all that the law requires (1 Chitty's Crim. Law, 211; *State v. Crank*, 2 Bail. 70; 23 Am. Dec. 117), and proof of the same character is sufficient. We find it also laid down in 1 Bishop's Crim. Proc., sec. 126 (of the edition in the supreme court library (1st ed.), which seems to be different from that cited by both counsel in this case), as follows: "The law does not take notice of orthography; therefore if a name is misspelled, no harm to the prosecution can come from this, provided the name as written in the indictment is *idem sonans*, as the books express it, with the true name." Our inquiry may therefore be narrowed down to the question, whether the name of the owner of the goods alleged to be stolen, as stated in the indictment, can be regarded as *idem sonans* with the name as given in the evidence. In the notes to the case of *Schooler v. Asherst*, 13 Am. Dec. 233, it is said: "The doctrine of *idem sonans* has been much enlarged by modern decisions to conform to the growing rule that a variance, to be material, must be such a one as has misled the opposite party to his prejudice," and the cases sustaining this statement are there cited. In *Ward v. State*, 28 Ala. 60, the court said: "The books abound in hair-breadth distinctions, but we apprehend the true rule to be, that if the names may be sounded alike, without doing violence to the power of the letters found in the variant orthography, then the variance is immaterial." We find no distinct enunciation of the rule in

our own state, but our courts have held that there is no fatal variance between the name Anthron and Antrum or Antrim: *State v. Scurry*, 3 Rich. 68; or between Cuffie and Cuffy or Cuff: *State v. Farr*, 12 Rich. 24.

It seems to us, therefore, that without referring to the numerous cases in the books where slight variations in orthography have sometimes been held fatal and sometimes not, without reference to any definite rule, it would be better to follow the rule which may be deduced from the more modern decisions, to this effect, that where the name, as written in the indictment, may be pronounced (although such may not be the strictly correct pronunciation) in the same way as the name given in the evidence, the variance will not be regarded as fatal, unless the variant orthography be such as would be likely to mislead the defendant in preparing his defense. Tested by this rule, we think it clear that there was no error on the part of the circuit judge in refusing the motion for a new trial on the ground stated. Kennedy may be pronounced Canada, and, as a matter of fact, sometimes is by uncultivated persons, and there is no pretense that the defendant was misled. It was admitted that the goods alleged to have been stolen, and which the jury have convicted the defendant of stealing, were the property of the witness, Canada McCutchen, and the fact that in the indictment the name of the owner was stated to be Kennedy McCutchen was not calculated to mislead, and so far as appears did not mislead, the defendant in preparing his defense.

The judgment of this court is, that the judgment of the circuit court be affirmed.

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**INDICTMENT — IDEM SONANS.** — Where the name of the owner of stolen goods is written in an indictment as "Fraude," while the proper spelling of it is "Freude," and expert evidence shows a wide difference in sound in pronouncing the two words, the question of variance in the names should be submitted to the jury, with instructions explanatory of the rules of *idem sonans*: *Weissel v. State*, 27 Tex. App. 523; 19 Am. St. Rep. 855, and note. For the application of the rule of *idem sonans* to indictments generally, see *Parchman v. State*, 2 Tex. App. 228; 27 Am. Rep. 435, and note; *Donnel v. United States*, 1 Morris, 141; 29 Am. Dec. 457; *State v. Patterson*, 2 Ired. 346; 38 Am. Dec. 699.

**IDEM SONANS.** — Kealiber and Keoliber, Kelliber, Kellier, Keolhier, or Kelhier are *idem sonans*: *Millett v. Blake*, 81 Me. 531; 10 Am. St. Rep. 275; and so are Zerelday and Serelda: *Cartwright v. McGown*, 121 Ill. 388; 2 Am. St. Rep. 105; John Bobb and John Babb: *Myer v. Fegaly*, 39 Pa. St. 429; 80 Am. Dec. 534; Penryn and Pennyryne: *Elliott v. Knott*, 14 Md. 121; 74 Am. Dec. 519; Dugald McInnis and Dougal McGinnis: *Barnes v. People*, 18 Ill.



52; 65 Am. Dec. 699; Giboney and Gibney: *Fleming v. Giboney*, 81 Tex. 424; Colin De Blond and Colin Bland: *Leland v. Echert*, 81 Tex. 226; Asahel Savary and Asah Savary: *Smith v. Gillum*, 80 Tex. 120. See also note to *Schoer v. Asher*, 13 Am. Dec. 233, 234. Hesser and Hesse are not *idem sonans*: *Aetna L. Ins. Co. v. Hesser*, 77 Iowa, 381; 14 Am. St. Rep. 297; nor Jost and Yoest: *Heil's Appeal*, 40 Pa. St. 453; 80 Am. Dec. 590; nor Miller and Millen: *Chamberlain v. Blodgett*, 96 Mo. 482. The question of *idem sonans* is not one of spelling: *Galliano v. Kilfoy*, 94 Cal. 86. Compare also *Lynn v. Sanford*, 82 Tex. 58, post, p. 852.

## HARDIN v. HARDIN.

[34 SOUTH CAROLINA, 77.]

**REFEREE'S REPORT, APPEAL LIES FROM DECREE CONFIRMING, WHEN.** — An appeal lies from a final decree confirming a referee's report, although no exception was taken thereto, where the matter involved in the appeal was not submitted to nor considered by the referee.

**MORTGAGEE HAS NO LIEN ON RENTS AND PROFITS OF MORTGAGED LAND.** — A mortgagee has no specific lien upon the rents and profits of mortgaged land, unless it is so stipulated in the mortgage. In South Carolina, the mortgagor still remains, even after condition broken, the owner of the mortgaged premises, and retains all the rights incident to such ownership, among them the right to receive the rents and profits.

**RECEIVER OF RENTS AND PROFITS OF MORTGAGED PREMISES CANNOT BE APPOINTED PENDING FORECLOSURE.** — Where a mortgage of land does not contain any provision subjecting the rents and profits of the mortgaged premises to a lien to secure the payment of the mortgage debt, and the complaint does not contain any allegation of waste of the mortgaged premises, the mortgagee is not entitled to have a receiver appointed to collect the rents and profits pending his suit for foreclosure.

**ERROR SUFFICIENTLY SHOWN [BY RECORD ON APPEAL, WHEN.]** — Although an appellant must show error in the judgment appealed from, yet he does this sufficiently when the case shows that a decree for the appointment of a receiver of the rents and profits of mortgaged premises was not warranted by the mortgage, as stated in the record on appeal.

**JUDGE BOUND BY DECREE OF HIS PREDECESSOR IN SAME CAUSE.** — A circuit judge is bound to carry out the orders of his predecessor in the same cause, but when the appellate court declares such orders erroneous, the consequences flowing therefrom must also be so regarded.

**ACTION to foreclose.** The opinion states the case.

*W. A. Sanders*, for the appellant.

*Barber and James*, contra.

**McIVER, J.** The action in this case was commenced on the 5th of February, 1890, to foreclose a mortgage on real estate, given to secure the payment of the purchase-money of the same. The complaint was in the usual form, and in addition thereto, contained the allegations that the mortgaged

premises were totally inadequate to satisfy plaintiff's demand, and that defendant had nothing to enable her to respond to a judgment for the balance, and in addition to the usual demand for relief, the plaintiff demanded "such an order as would protect the premises and secure to him the results [probably a misprint for rents] and profits pending the litigation." The defendant answered, setting up various defenses, including a general denial of the allegations contained in the complaint.

On the 10th of March, 1890, notice was served on defendant, that, at the ensuing term of the court, an application would be made for the appointment of a receiver, based upon the pleadings, certain affidavits, and the mortgage, copies of which were served with the notice, and the deed of 23d of February, 1887, conveying the premises from the plaintiff to the defendant, upon the ground that the mortgaged premises are in the possession of the defendant; that the same are totally insufficient to pay the amount due the plaintiff; and that defendant has no other property out of which the mortgage debt can be satisfied. The affidavits are all set in the "case," and tend to show that the defendant is insolvent, and that the mortgaged premises are not sufficient to satisfy the mortgage debt. This motion was heard by his honor Judge Norton, who granted an order appointing a receiver of the rents and profits of the mortgaged premises, and directing the defendant to turn over to the receiver the said rents and profits.

The issues, both of law and fact, were referred to a referee, and at the trial before him the plaintiff established each and every allegation in his complaint, and the defendant having offered no evidence, the case was submitted to the referee without argument, who filed his report, to which no exceptions were taken, and upon this report Judge Wallace rendered judgment (of foreclosure, we presume, though it is not so stated in the "case") on the 25th of June, 1890, which contained, amongst other things, the following provision: "It is further ordered that the receiver of the rents and profits of the said premises pending this litigation pay such sum as he may collect as rents, after deducting his commissions, to the plaintiff, should the sum realized from the state of the premises be insufficient to satisfy his demands."

From this judgment, as well as from the interlocutory order of Judge Norton appointing a receiver, defendant appeals upon the several grounds set out in the record, which need not be repeated here.

Before proceeding to consider the merits of this appeal, it will be necessary to consider two preliminary objections raised by counsel for respondent, the first of which, however, will, in our judgment, be more appropriately considered in connection with the merits, and will therefore be passed over for the present. The second is, that inasmuch as there was no exception taken to the report of the referee, there could be no appeal taken from the final decree of his honor Judge Wallace, confirming the referee's report. However this might be if the present appeal undertook to question the correctness of any of the findings of law or fact by the referee which were confirmed by the circuit judge need not be considered, inasmuch as the appeal imputes no error in this respect, and questions only the right to have a receiver appointed, and the disposition of the rents and profits collected by him, a matter with which, so far as appears, the referee had nothing whatever to do. It seems to us, therefore, that the appeal is properly before us, and it presents substantially but a single question, — whether, in the case as made by the plaintiff, he was entitled to an order for the appointment of a receiver; for if he was, then that portion of the decree of Judge Wallace which is appealed from was right, but if he was not, then it is erroneous.

It is well settled in this state, that by the act of 1791, as it has been construed in many decisions which are so well known to the profession as to render it unnecessary to cite them, the relation of mortgagor and mortgagee is totally different from that which existed at common law. By our law a mortgage of real estate is not a conveyance of any estate whatever, but is simply a contract whereby the mortgagee obtains a lien on the property mortgaged as a security for the payment of a debt. The mortgagor still remains, even after condition broken, the owner of the mortgaged premises, and retains all the rights incident to such ownership, amongst which is the right to receive the rents and profits, while the mortgagee simply holds a lien upon the property to secure the payment of his debt, which he may enforce in any of the modes recognized by law. But having no title to or ownership of the mortgaged premises, he cannot claim any of the rights incident to such a relation. His rights are limited by the terms of the contract as found in the mortgage, and by that contract he simply has a lien on the mortgaged premises, and that he may enforce in any proper way.

A mortgage on real estate in the usual form gives no lien upon the produce of the land; for if it did, then no one could safely buy from the mortgagor a bale of cotton, or any other produce raised upon the mortgaged premises, as it might be followed into the hands of the purchaser by the mortgagee and sold under his lien. On the contrary, the rule is well stated in the quotation from Jones on Mortgages, sec. 771, found in the case of *Reeder v. Dargan*, 15 S. C. 185, in these words: "A mortgagee has no specific lien upon the rents and profits of the mortgaged land, unless he has in the mortgage stipulated for a specific pledge of them as part of his security. He has no claim upon them until he has the right to take possession of the premises under the mortgage." It seems to us, therefore, that the question whether the mortgagee can, before or pending proceedings for foreclosure, subject the rents and profits of the mortgaged premises to the payment of his debt depends entirely upon the contract of the parties, as stated in the mortgage. If there is a stipulation therein that the mortgagee shall have a lien upon the rents and profits, as well as upon the land, then, of course, such lien may be made effective by the appointment of a receiver, under proper allegations and proofs; but if the mortgage contains no such stipulation, then the mortgagee has no higher or better claim to the rents and profits than an unsecured creditor of the mortgagor.

While the authorities elsewhere seem to be somewhat conflicting upon this point, growing probably out of the failure to keep in mind the marked distinction between the nature and effect of a mortgage at common law and under statutes like our act of 1791, it seems to us that the cases in this state are in accord with the view herein presented. The case of *Stoney v. Shultz*, 1 Hill Ch. 499, 27 Am. Dec. 429, is not in conflict, for there the mortgagor was out of possession, and hence, by the express terms of the statute, the provisions of the act of 1791 did not apply. It is true that Dargan, Ch., in *Matthews v. Preston*, 6 Rich. Eq. 307, does intimate that where the mortgaged premises are in the occupancy of a tenant under a lease from the mortgagor, the mortgagee may, by proper proceedings, subject the rents due by such tenant to the payment of the mortgage debt, citing the case of *Stoney v. Shultz*, 1 Hill Ch. 499, 27 Am. Dec. 429, which, as we have seen, was a case in which the act of 1791 did not apply; but he says in the same case "that the mortgagor in possession is not liable to the mortgagee on account of rents." And again he says:

"If the mortgagor or the assignee of the equity of redemption have tenants in possession of the mortgaged premises paying rent, such tenants may be brought into this court and be required to pay the accruing rents, or their rents in arrear, for the benefit of a mortgagee whose security from the mortgaged premises is inadequate. But I am aware of no case nor have I been able to find a single authority to support the proposition that the mortgagor or the assignee of his equity of redemption is liable to account to the mortgagee for rents in consequence of their own use and occupation of the mortgaged premises, or for rents actually received by them from their tenants before bill filed or before notice."

The distinction which the learned chancellor seems to draw between a case where the mortgagor retains the use and occupation of the mortgaged premises and where the same are leased to a third person is somewhat difficult to appreciate.

It may be possible that he regarded the mortgagor as out of possession where the premises are leased to another; but if so, he was clearly in error, as it has been settled otherwise in the subsequent cases of *Laffan v. Kennedy*, 15 Rich. 246, and *Warren v. Raymond*, 12 S. C. 9. But whatever may have been the ground of the distinction, it is sufficient to know that the view we adopt in this case is fully supported by that case, as it is conceded that the mortgagor was in this case in the actual occupation of the mortgaged premises, and therefore not liable to account for rents in consequence of her own use and occupation.

It seems to us, also, that the case of *Reeder v. Dargan*, 15 S. C. 175, so far from containing any intimation to the contrary, as is contended by counsel for respondent, supports the view which we have adopted. See also the case of *Seignious v. Pate*, 32 S. C. 137, 17 Am. St. Rep. 846, which, though decided upon another point, after alluding to the marked distinction between the nature and effect of a mortgage at common law and a similar instrument under our law, contains the following language, quite appropriate to our present inquiry: "Such being the well-established character and legal effect of a mortgage in this state under the act of 1791, so long as the mortgagor remains in possession, it would seem to follow, logically and necessarily, that, in the absence of any pledge by the mortgagor in the mortgage of the rents and profits, they would legally belong to the mortgagor, with no claim whatever thereon by the mortgagee in advance of a foreclosure, previous to which

the mortgagor would have the right to dispose of said rents as he chose. Otherwise the court would make the contract for the parties, instead of the parties themselves, if it assumed to turn over said rents and profits to the mortgagee, in the absence of any stipulation to that end, or of any pledge thereof."

Applying these principles to the case in hand, it is quite clear that there was error in granting the order for the appointment of a receiver. So much of section 265 of the code as applies to this case reads as follows: "A receiver may be appointed by a judge of the circuit court, either in or out of court, — 1. Before judgment, on the application of either party, when he establishes an apparent right to property which is the subject of the action, and which is in the possession of an adverse party, and the property, or its rents and profits, are in danger of being lost or materially injured or impaired." Now, as we have seen, the mortgage gives to the mortgagee no real or even apparent right to the mortgaged premises, and certainly none whatever to the rents and profits thereof, and hence this provision of the code did not warrant the appointment of a receiver. The mortgagor, remaining the owner of the mortgaged premises until the sale thereof, was of course entitled as such to the rents and profits, and we are unable to perceive by what authority the property of one, against whom no debt even has been established, can be seized and impounded, pending an effort on the part of an alleged creditor to establish a claim against the acknowledged owner of such property. Neither a copy of the complaint nor of the mortgage is set out in the "case," and we only know the allegations of the one and the terms of the other from what is there stated. It does not appear that the mortgage contained any provision subjecting the rents and profits of the mortgaged premises to a lien to secure the payment of the mortgage debt, and no such allegation appears to be in the complaint, nor is there any allegation that the mortgagor has committed, or is even about to commit, any waste of the mortgaged premises, and hence we do not see that any case was stated in the complaint which would warrant the appointment of a receiver of the rents and profits.

While it is true, as urged by respondent's counsel as the first preliminary objection alluded to above, that if there is not enough appearing in the "case" to indicate error in the action of the court below, then the judgment of the court must be affirmed, yet the application which counsel proposes to make of this proposition in the present instance, to wit, that if the

question turns upon the terms of the mortgage, and a copy of the same is not incorporated in the "case," then this court cannot undertake to say that there is any error in the judgment appealed from, cannot be approved. It was for the plaintiff to state and prove such a case as would entitle him to the relief demanded, and if, in stating the terms of the mortgage upon which his claim is based, he fails to show that the mortgage contained any stipulation subjecting the rents and profits of the mortgaged premises to a lien to secure the payment of the mortgage debt, then such omission is fatal to his claim to have a receiver appointed.

But again, while it is not stated distinctly in the "case" that the order appointing a receiver was granted before any referee was appointed, or at least before any reference had been held, yet the inference is irresistible that such was the fact, and if so, then clearly there was no authority for the granting of such an order; for until the reference was held, the parties were at issue as to all the allegations in the complaint, and the plaintiff had not then established any apparent right to any property whatever, and had not even established any claim against the defendant, as the affidavits used in support of the motion for the appointment of a receiver seem mainly intended to show the insolvency of the defendant and the insufficiency of the mortgaged premises to satisfy the mortgage debt. But we are not disposed to rest our conclusion upon this, and prefer to base it upon the broader ground stated above, that no case was stated warranting the appointment of a receiver.

It only remains to consider the exception to that portion of the judgment of his honor Judge Wallace, which directed the receiver to pay over to the plaintiff such sum as he may collect as rents, after deducting his commissions, if the proceeds of the sale of the mortgaged premises should prove insufficient to satisfy the mortgage debt. Inasmuch as Judge Wallace had no authority to review the order of his predecessor, and was not at liberty to disregard the same, it cannot be said that there was any error on his part, as the case was presented to him, in inserting the provision complained of in his judgment of foreclosure; for if there had been no error in granting the order for the appointment of a receiver, such provision would legitimately have followed; but as it has now been ascertained that the order appointing the receiver was erroneous, the consequence flowing from it must also be so regarded.



The judgment of this court is, that the order of Judge Norton, and so much of the judgment of Judge Wallace as is appealed from, be reversed, and that the case be remanded to the circuit court for such further proceedings as may be necessary.

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**MORTGAGEE'S RIGHT TO RENTS AND TO A RECEIVER TO SECURE THEIR PAYMENT.** — In the absence of a stipulation in the mortgage, a mortgagee, as such, has no right to the rents and profits of mortgaged property. In order to obtain a right to the rents and profits before his debt becomes due, he must take a specific pledge of them for the security of his debt: *Argall v. Pitts*, 78 N. Y. 239; *Wyckoff v. Scofield*, 98 N. Y. 475; *Douglass v. Oline*, 12 Bush, 608; *Woolley v. Holt*, 14 Bush, 788; *Killebrew v. Hines*, 104 N. O. 182; 17 Am. St. Rep. 672; *Whitehead v. Wooten*, 43 Miss. 523; *Williams v. Noland*, 2 Tenn. Ch. 151; *Syracuse City Bank v. Tallman*, 31 Barb. 201. He can only become entitled to the rents by commencing suit for foreclosure, and procuring the appointment of a receiver, and then he is confined to the rents accruing during the pendency of the suit: *Argall v. Pitts*, 78 N. Y. 239; *Jacobs v. Gibson*, 9 Neb. 380; *Childs v. Hurd*, 32 W. Va. 66. Where a mortgagee has neglected to take a specific pledge of the rents and profits for the security of his debt before it becomes due, he has no equitable right to the rents and profits in the mean time, and if the mortgagor dies, his judgment creditors are entitled to a preference in payment out of such rents and profits: *Bank of Ogdensburgh v. Arnold*, 5 Paige, 38. A mortgage which does not by its terms pledge the rents and profits of the mortgaged premises gives the mortgagee no lien on them, and the mortgagor may take them and assign them without liability to account for them to the mortgagee. And if the mortgagor appropriates them before the mortgagee has acquired a specific lien on them, the mortgagee can never recover them back: *Leeds v. Gifford*, 41 N. J. Eq. 464; *Howell v. Ripley*, 10 Paige, 43; *Lehman v. Tallances Mfg. Co.*, 64 Ala. 567; *Wyckoff v. Scofield*, 98 N. Y. 475; *Keyser v. Hitz*, Mackey, 179.

**MORTGAGOR IN POSSESSION ENTITLED TO RENTS.** — A mortgagor who is allowed to remain in possession of the mortgaged premises is entitled to the rents and profits thereof, and has the right to take and appropriate them to his own use without accounting for them to the mortgagee: *Best v. Schermier*, 6 N. J. Eq. 154; *Silverman v. Northwestern Mut. Life Ins. Co.*, 5 Ill. App. 124; *Harrison v. Wyse*, 24 Conn. 1; 63 Am. Dec. 151; *Rider v. Bagley*, 84 N. Y. 461; *Olason v. Corley*, 5 Sand. 447; *Childs v. Hurd*, 32 W. Va. 66; *Jacobs v. Gibson*, 9 Neb. 380. In delivering the opinion of the court in *Best v. Schermier*, 6 N. J. Eq. 155, Halsted, C., said: "I have considered that the mortgagor is entitled to the rents while he is in possession by his tenants. I am satisfied that the contrary practice was inconsistent with what is now well understood to be the nature of a mortgage, and led to great oppression." And Green, J., in delivering the opinion of the court in *Childs v. Hurd*, 32 W. Va. 87, said: "So long as the mortgagor is allowed to remain in possession he is entitled to receive and apply to his own use the increase and profits of the mortgaged estate; and although the mortgagee may have the right to take possession upon condition broken, if he does not exercise the right he cannot claim the rents; if he wishes to receive the rents he must take means to obtain the possession." And the assignee of the mortgagor or the purchaser of the equity of redemption stands in the place of the mortgagor and suc-

ceeds to all his rights: *Syracuse City Bank v. Talcott*, 31 Barb. 201; *Silverman v. Northwestern Mut. Life Ins. Co.*, 5 Ill. App. 124. But a mortgagee who takes possession of the mortgaged premises, and receives the rents and profits, must apply them to the payment of his debt, and account for them: *Harrison v. Wyse*, 24 Conn. 1; 63 Am. Dec. 151.

**MORTGAGEE'S RIGHTS AT COMMON LAW.** — At common law, the mortgagee, immediately upon the execution of the mortgage deed, became seized of an estate in fee in the mortgaged premises. The occupation of a mortgagor who remained in possession after the execution of the mortgage was like that of a tenant at will. The mortgagee was deemed the absolute owner, having a right to enter and to maintain a possessory action against the mortgagor, or any other person, except tenants who had entered under leases made prior to the execution of the mortgage. But if the mortgage deed contained covenants by which the mortgagor was entitled to retain the possession, a court of equity would protect him in the enjoyment of such right, and enjoin any action or other proceeding instituted by the mortgagee to eject him: *Matthews v. Preston*, 6 Rich. Eq. 307, note.

**RECEIVER OF RENTS OF MORTGAGED PROPERTY, APPOINTMENT OF.** — Under the rule that formerly prevailed in England, a mortgagee who had a legal estate and could enter after a default, or recover possession in an action at law, was held not to be entitled to a receiver of the rents of the mortgaged estate: *Berney v. Sewell*, 1 Jacob & W. 647; *Sturch v. Young*, 5 Beav. 557; *Ackland v. Gravenor*, 31 Beav. 482; *Williams v. Robinson*, 16 Conn. 517; *High on Receivers*, 2d ed., sec. 640; 2 Jones on Mortgages, 4th ed., sec. 1519. The reason given for this rule was, that the legal mortgagee, being entitled to immediate possession, stood in no need of the aid of equity, because he could at once protect his interest by himself taking possession. But by the statute 23 & 24 Vict., c. 145, secs. 11-32, it is provided that the mortgagee, in all cases where the payment of the principal is in arrear one year, or the interest six months, or after any omission to pay any insurance premium which by the terms of the deed, ought to be paid, may obtain the appointment of a receiver of the rents and profits of the estate mortgaged. And even under the rule prevailing in England before the enactment of this statute, a receiver was generally appointed if the circumstances of the case were such that the mortgagee could not obtain possession by an action at law. Thus a second mortgagee, who was regarded as having an equitable estate only, and who was unable to enter as against the first mortgagee, was generally held to be entitled to the appointment of a receiver, when proper reasons for the appointment were shown. But such appointment was without prejudice to the right of the first mortgagee to obtain possession: *Bryan v. Cormick*, 1 Cox C. C. 422; *Dalmer v. Dashwood*, 2 Cox C. C. 378; *Berney v. Sewell*, 1 Jacob & W. 647; *Anderson v. Kemshood*, 16 Beav. 329; *Ackland v. Gravenor*, 31 Beav. 482; *Meaden v. Sealey*, 6 Hare, 620; and see *Cortleyou v. Hathaway*, 11 N. J. Eq. 39; 64 Am. Dec. 478.

**APPOINTMENT LARGELY IN DISCRETION OF COURT.** — Courts of equity in this country seem, as a general rule, to have been more liberal in the exercise of their power to appoint receivers of the rents and profits in mortgage cases. Yet it is well settled in this country that the appointment of a receiver rests largely in the discretion of the court, and is governed, to a great extent, by the circumstances of each particular case: *Mihonukos etc. R. R. Co. v. Boutter*, 2 Wall. 510; *Verplank v. Caines*, 1 Johns. Ch. 57; *Rider v. Bagley*, 84 N. Y. 461; *Hursh v. Hursh*, 99 Ind. 500; *Douglas v. Cline*, 12 Bush, 608; *Lowell v. Doe*, 44 Minn. 144; *Myers v. Estell*, 48 Miss. 372; *Jacobs v. Gibson*,

9 Neb. 380; *Cone v. Pault*, 12 Heisk. 506; *Morrison v. Buckner*, Hempst. 442; *Sales v. Lusk*, 60 Wis. 490. It is not a matter of course to appoint a receiver in a foreclosure suit: *Hackett v. Snow*, 10 Ired. Eq. 220.

**APPOINTMENT MADE WITH GREAT CAUTION, AND ONLY ON GOOD GROUNDS.** — The appointment of a receiver of the rents and profits of mortgaged property should be made with great caution, and only in cases of pressing and apparent necessity: *Patten v. Accessory Transit Co.*, 4 Abb. Pr. 237; *Shotwell v. Smith*, 3 Edw. Ch. 588. To warrant the appointment of a receiver, it must clearly appear that the mortgagor, or other person liable for the mortgage debt, is hopelessly insolvent, and that the property mortgaged is inadequate security for the debt: *Cone v. Combs*, 5 McCrary, 651; *Syracuse City Bank v. Tallman*, 31 Barb. 201; *Brown v. Chase*, Walk. Ch. 43; *Williams v. Noland*, 2 Tenn. Ch. 151. And a security is presumed to be sufficient until the contrary is shown: *Brown v. Chase*, Walk. Ch. 43. A receiver will not be appointed in a foreclosure suit, unless it is made to appear that there is an imperative necessity for the appointment: *Sales v. Lusk*, 60 Wis. 490; *Syracuse City Bank v. Tallman*, 31 Barb. 201; *Silverman v. Northwestern M. L. I. Co.*, 5 Ill. App. 124. A receiver will not be appointed unless it is clearly made to appear that the security is inadequate, or that the rents and profits are in danger of being lost, or materially injured or impaired, or that there is imminent danger of the waste, removal, or destruction of the mortgaged property: *Morrison v. Buckner*, Hempst. 442; *Callanan v. Shaw*, 19 Iowa, 183; *Sleeper v. Iselin*, 59 Iowa, 379. In no mortgage case ought a receiver to be appointed when it appears that on a foreclosure the mortgaged premises will bring enough to pay the amount of the mortgage debt, with the interests and costs: *Pullan v. Cincinnati etc. R. R. Co.*, 4 Biss. 35. Nor will a receiver be appointed when the rents and profits are being applied to the payment of the mortgage debt, and the necessary expenses incurred in the management and care of the property: *Myton v. Davenport*, 51 Iowa, 583. And where the security has not decreased since the mortgage was given, and there is no evidence that the property is being mismanaged by the assignee in possession thereof, a receiver should not be appointed upon the application of a plaintiff seeking to intercept the rents and profits, and divert them to his own use, to the prejudice of prior mortgagees, although the mortgagor is non-resident and insolvent: *Sales v. Lusk*, 60 Wis. 490. And it is error to appoint a receiver in a foreclosure suit, where no waste, or failure to pay taxes, or diminution of the value of the security, or increase of the mortgage debt has been shown, but, on the contrary, it has been shown that such debt has been reduced since the taking of the mortgage; that less than half of the remaining debt is due, including only a small amount of interest; that the property consists of city lots, presumably salable in parcels; and that there is nothing to show that a party personally liable for a large part of the debt is not responsible to the full amount of any probable deficiency: *Morris v. Branchaud*, 52 Wis. 187.

**RECEIVER WILL BE APPOINTED WHEN.** — While the appointment of a receiver rests, as has been shown, in the discretion of the court, and will not be made except upon good grounds shown, it is well settled by the great weight of authority that upon the commencement of a suit to foreclose a mortgage, a court of equity will, upon the application of the mortgagee, appoint a receiver of the rents and profits of the mortgaged premises, whenever sufficient equitable grounds for such appointment are shown. The principal grounds upon which such relief is granted are: 1. That the property covered by the mortgage is an inadequate security for the payment of the debt, with the accrued interest and costs of suit; and 2. That the mortgagor, or other per-

son liable for the payment of the debt, is insolvent, beyond the jurisdiction, or in such doubtful financial standing that an execution against him for any deficiency would be unavailing. Where these two grounds are shown to exist, a court of equity is almost universally regarded as having power to appoint a receiver of the rents and profits: *Kountze v. Omaha Hotel Co.*, 107 U. S. 378; *Grant v. Phoenix M. L. I. Co.*, 121 U. S. 105; *Lehman v. Tallman Mfg. Co.*, 64 Ala. 567; *Price v. Dowsdy*, 34 Ark. 285; *Pasco v. Gamble*, 15 Fla. 562; *Haas v. Chicago Building Society*, 89 Ill. 498; *Main v. Ginthert*, 92 Ind. 180; *Douglass v. Cline*, 12 Bush, 608; *Lowell v. Doe*, 44 Minn. 144; *Phillips v. Miland*, 52 Miss. 721; *Hymen v. Kelly*, 1 Nev. 179; *Bank of Ogdensburg v. Arnold*, 5 Paige, 39; *Sea Ins. Co. v. Stebbins*, 8 Paige, 565; *Astor v. Turner*, 11 Paige, 436; 43 Am. Dec. 766; *Warner v. Gouverneur*, 1 Barb. 36; *Astor v. Turner*, 2 Barb. 444; *Smith v. Tiffany*, 13 Hun, 671; *Hollenbeck v. Donell*, 29 Hun, 94; *Kerchner v. Fairley*, 80 N. C. 24; *Oldham v. First Nat. Bank of Wilmington*, 84 N. C. 304; *Henshaw v. Wells*, 9 Humph. 568; *Finch v. Houghton*, 19 Wis. 149; *Schreiber v. Carey*, 48 Wis. 206. In Nebraska, if it appears that the mortgaged property "is probably insufficient to discharge the mortgage debt," a receiver will be appointed: *Jacobs v. Gibson*, 9 Neb. 389. And in *Belau v. Crampton*, 61 Ala. 507, it was held that where a mortgagor who agreed in the mortgage to insure the property, pay taxes, and keep it in repair failed to do so, and was shown to be insolvent, the court would not closely scrutinize conflicting evidence as to the value of the mortgaged premises, upon which a receiver was appointed. So in *Bolles v. Duff*, 35 How. Pr. 481, it was held that if the mortgagee is irresponsible, or is committing waste, or the rents and profits are in danger of being lost, a receiver will be appointed. See also *Worrill v. Ocker*, 56 Ga. 666. And in Kentucky a receiver will be appointed when the mortgaged property is in danger of being lost, removed, or materially injured, or the condition of the mortgage has not been performed: *Newport etc. Bridge Co. v. Douglass*, 12 Bush, 672; *Woolley v. Holt*, 14 Bush, 788. In Indiana, it seems, it is only necessary to show that the property mortgaged is insufficient to discharge the mortgage debt, without showing that the mortgagor is insolvent: *Pender v. Statz*, 96 Ind. 820; *Hurah v. Hurah*, 99 Ind. 500.

**PROVISION IN MORTGAGE FOR APPOINTMENT OF RECEIVER, EFFORT OF.** — When a mortgage contains a provision that in case of default a receiver of the rents may be appointed, the court will appoint a receiver upon a less clear showing than where the mortgage contains no such provision. It will not, however, enforce such a provision if, under all the circumstances of the case, it would be inequitable to do so. But if there is no good reason shown why it should not be enforced, a court of equity will specifically enforce it: *Krogh Mfg. Co. v. Whiston*, 26 Abb. N. C. 358; *Des Moines Gas Co. v. West*, 44 Iowa, 23; *Paine v. McElroy*, 73 Iowa, 81.

**APPOINTMENT OF RECEIVER AFTER DECREE.** — The appointment of a receiver after final decree is unusual, and if allowable, should be supported by a strong showing of facts: *Adair v. Wright*, 16 Iowa, 385; 2 Jones on Mortgages, sec. 1531. But where facts sufficient to justify it are shown, a receiver may be appointed after decree, and even after appeal: *Bank of Union v. Finch*, 3 Barb. Ch. 293; 49 Am. Dec. 175; *Oldham v. First National Bank of Wilmington*, 84 N. C. 304; *Thomas v. Davies*, 11 Beav. 29. And in Indiana, the court may appoint a receiver of the rents and profits during the year allowed for redemption, where the appointment is necessary to secure ample justice to the parties: *Connelly v. Dickson*, 76 Ind. 440; *Merritt v. Gibson*, 129 Ind. 155. And a receiver who has been properly appointed may be continue

after the decree: *Buchanan v. Berkshire L. I. Co.*, 96 Ind. 510. But a mortgagee who, having become the purchaser at his own sale, brings a suit to have the uncertainty of his title resolved, is not entitled to have a receiver appointed in that suit: *McLean v. Presley*, 56 Ala. 211.

**RECEIVER NOT APPOINTED IN NEW JERSEY FOR MERE INADEQUACY AND INSOLVENCY.**—The rule that a receiver of the rents and profits will be appointed where the mortgaged premises are inadequate security for the mortgage debt and the mortgagor is insolvent, has not been adopted by the courts of New Jersey. Such inadequacy and insolvency are not in themselves regarded as sufficient grounds to warrant the appointment of a receiver in that state: *Cortleyou v. Hathaway*, 11 N. J. Eq. 39; 64 Am. Dec. 478; *Best v. Schermier*, 6 N. J. Eq. 154; *Frisbie v. Bateman*, 24 N. J. Eq. 28. But where the buildings upon the mortgaged premises have been burned down, and the property generally has been permitted to go to waste, through the fault of the person in possession, or where fraud or bad faith is shown by the misappropriation of the rents and profits, a receiver may properly be appointed: *Cortleyou v. Hathaway*, 11 N. J. Eq. 39; 64 Am. Dec. 478. A receiver will also be appointed in aid of an action of ejectment by a mortgagee to obtain possession of the mortgaged premises, when the mortgagor is insolvent, the property is insufficient security, the mortgagor has removed from the premises and given possession to a person who is to occupy them without accounting for the use thereof, and the mortgagor has committed waste and threatens to commit more: *Brasted v. Sutton*, 30 N. J. Eq. 462. So a first mortgagee is entitled to a receiver in a suit to foreclose his mortgage, where he shows that he has no personal security for his debt, that the premises are an insufficient security, that the mortgagor has not paid the interest, and that he has failed to pay the taxes upon the premises, whereby a lien has been created paramount to that of the mortgage, and which may, if not itself extinguished, extinguish the mortgage: *Mahon v. Crothers*, 28 N. J. Eq. 567. And the appointment of a receiver is justified, pending foreclosure, where the mortgagor receives the rents and refuses to apply them to the payment of the interest due, the premises being inadequate security, and there being no personal security, although the unpaid taxes on the premises may be a lien subsequent to that of the mortgage: *Stockman v. Wallis*, 30 N. J. Eq. 449; *Chetwood v. Coffin*, 30 N. J. Eq. 450.

**RECEIVER NOT APPOINTED IN MICHIGAN.**—It is held by the supreme court of Michigan that under the statute of that state the mortgagor is entitled absolutely to the possession of the mortgaged property until the mortgagee's title becomes absolute under the foreclosure, and that the mortgagee is not entitled to the rents pending the foreclosure, nor to the appointment of a receiver to collect them: *Wagar v. Stone*, 36 Mich. 364; *Beecher v. Marquette etc. Co.*, 40 Mich. 307; *Hameline v. Granger*, 44 Mich. 503. In delivering the opinion of the court in *Wagar v. Stone*, 36 Mich. 367, Marston, J., said: "Since the passage of this act, which prevents the mortgagee from obtaining possession until he has acquired an absolute title to the mortgaged premises, the mortgage binds only the lands. The rents and profits of the land do not enter into or form any part of the security. At the time of giving the security both parties understand that the mortgagor will, and that the mortgagee will not, be entitled to the rents, issues, or profits of the mortgaged premises, until the title shall have become absolute upon a foreclosure of the mortgage. Until the happening of this event, the mortgagor has a clear right to the possession and to the income which he may derive therefrom, and the legislature, by the passage of this statute, contemplated that he

should have such possession and income to aid him in paying the debt. It would be a novel doctrine to hold that the mortgagee had a right to the profits incident to ownership, and yet that he had neither a legal title or right to possession. The legislature, in depriving him of the means of enforcing possession, intended thereby also to cut off and deprive him of all rights which he could have acquired in case he obtained possession before acquiring an absolute title. To deprive him of this particular remedy, and yet allow him in some other proceeding to, in effect, arrive at the same result, would be but a meaningless proceeding, and would not be securing to the mortgagor those substantial rights which it was the evident intent he should have. We do not overlook the fact that a contrary doctrine has been held elsewhere under a similar statute. We cannot avoid thinking, however, that for us to so hold would be a mere evasion of our statute."

In an early case in California, also, it was decided that an order appointing a receiver in a suit to foreclose a mortgage was erroneous, and must be reversed: *Guy v. Ida*, 6 Cal. 99; 65 Am. Dec. 490. But the code of that state now provides that a receiver may be appointed "in an action by a mortgagee for the foreclosure of his mortgage and sale of the mortgaged property, where it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt": Cal. Code Civ. Proc., sec. 564, subd. 2.

**NO RECEIVER APPOINTED AGAINST FIRST MORTGAGEE IN POSSESSION.** — Where a prior mortgagee is in possession of the mortgaged premises, the court will not, upon the application of a subsequent mortgagee, appoint a receiver, to the prejudice of such prior mortgagee, while anything remains due on his mortgage: 2 Jones on Mortgages, sec. 1523; High on Receivers, sec. 679; *Berney v. Sewell*, 1 Jacob & W. 647; *Ross v. Wood*, 2 Jacob & W. 552; *Quarrell v. Beckford*, 13 Ves. 377; *Codrington v. Parker*, 16 Ves. 469; *Hiles v. Moore*, 15 Beav. 175; *Dalmer v. Dushwood*, 2 Cox C. C. 378; *Trenton Banking Co. v. Woodruff*, 3 N. J. Eq. 210; *Bolles v. Duff*, 25 How. Pr. 431; *Salas v. Lust*, 60 Wis. 490. But if he confesses that he has been paid off, or refuses to accept what is due to him, a receiver may be appointed against him: *Berney v. Sewell*, 1 Jacob & W. 647. So if he fails to render his accounts so that it can be ascertained whether or not he has been fully paid: *Codrington v. Parker*, 16 Ves. 469. So, also, if he refuses to swear that anything is due to him: *Quarrell v. Beckford*, 13 Ves. 377.

**RECEIVER NOT APPOINTED AFTER APPOINTMENT OF ASSIGNEE IN BANKRUPTCY.** — Where a mortgagor goes into bankruptcy, and an assignee is appointed, or where he makes an assignment for the benefit of his creditors, a receiver will not be appointed. The assignee is by law clothed with like functions to those of a receiver: *In re Bennett*, 2 Hughes, 156; *Seignious v. Pate*, 32 S. C. 134; 17 Am. St. Rep. 346.

**RECEIVER APPOINTED ONLY OF PROPERTY MORTGAGED.** — A mortgagee can only have a receiver appointed for the property upon which his mortgage is a lien: *Myton v. Davenport*, 51 Iowa, 583; *White v. Griggs*, 54 Iowa, 650.

**APPOINTMENT SHOULD BE MADE UPON NOTICE.** — A receiver should not be appointed without notice to the party whose property is to be divested, except in cases of the gravest emergency, demanding the immediate interference of the court to prevent irreparable injury: *Haas v. Chicago Building Society*, 89 Ill. 496; *Moyers v. Coiner*, 23 Fla. 422; *Whitehead v. Wooten*, 43 Miss. 523.



**STATE v. LEVELLE.**

[34 SOUTH CAROLINA, 120.]

**PRESUMPTION THAT ORDINARY AND PROBABLE CONSEQUENCES OF ACT ARE INTENDED.** — Every sane man is presumed to intend the ordinary and probable consequences of any act that he purposely does.

**MALICE INFERRED FROM USE OF DEADLY WEAPON.** — Malice may be inferred from the use of a deadly weapon, causing death, unless rebutted by other testimony.

**MALICE IMPLIED WITHOUT REFERENCE TO WHAT WAS PASSING IN PRISONER'S MIND, WHEN.** — If the act which produced death be attended with such circumstances as indicate a wicked, depraved, and malignant spirit, the law will imply malice, without reference to what was passing in the prisoner's mind at the time.

**INSTRUCTIONS TO JURY MUST BE ASSUMED TO HAVE BEEN APPLICABLE TO CASE.** — Where none of the testimony is incorporated in the "case," the supreme court cannot assume that instructions given to the jury were either inapplicable to the case made, or calculated to mislead the jury; on the contrary, it is bound to assume that they were applicable.

**PROVOCATION BY WORDS ONLY NOT SUFFICIENT TO REDUCE CRIME FROM MURDER TO MANSLAUGHTER.** — Where a homicide is committed with a deadly weapon, provocation by words only, no matter how opprobrious, is not sufficient to reduce the crime from murder to manslaughter.

**SUICIDE, ONE WHO KILLS ANOTHER IN ATTEMPTING TO COMMIT, GUILTY OF MURDER.** — Where suicide is treated as a felony, one who, in attempting to commit suicide, unintentionally kills another is guilty of murder.

**MORAL INSANITY OR UNCONTROLLABLE IMPULSE NOT DEFENSE AGAINST CHARGE OF CRIME.** — In South Carolina, moral insanity or uncontrollable impulse is not a defense against a charge of crime.

**WHOLE OF CHARGE TO JURY TO BE CONSIDERED TOGETHER.** — The whole of a judge's charge to the jury must be considered together, and where, when so considered, it correctly states the law, it will be upheld, although a particular sentence thereof, if considered by itself, might be open to objection.

**INDICTMENT for murder.** The charge of Judge Aldrich referred to in the opinion is as follows: —

"You have been selected from the body of the county of Charleston as good and true men, and impaneled, in pursuance of the law, as a jury to pass upon the allegations contained in the indictment against the defendant at the bar, Napoleon Levelle, charged with the murder of Belle Levelle. The case has been ably and learnedly argued. You heard much at the beginning of the case as to comments in the newspapers and otherwise, so much so that the jurors were required to be sworn on their *voir dire*. Fortunately for us, this is a law-abiding community, where peace and good order reign and law blesses the people of your community. Here, in this temple of justice, at the threshold of that door, public opinion



stands back abashed. It has no part or parcel in these proceedings. Here pure, simple justice is dispensed freely and alike to all. The rich have no advantage. The poor is bereft of no protection. In the eye of the law they are equal citizens, standing upon the same plane, punishable by the same law, and protected by the same law. You are not here to pass upon any question which may affect individuals, as if you were trying the defendant in a case with an individual. You represent society, — the country, of which country you are. The question is, Has the defendant, the prisoner at the bar, violated the laws of society, — that is, the law of the state, as charged and alleged in the indictment? Outside of those charges, and with any others, you have nothing to do.

“Murder is the killing of any person with malice aforethought, either express or implied. Manslaughter is the killing of any person without malice aforethought. That is the legal, technical definition, but to make it appear clearly to your minds, it is usually defined that manslaughter is the killing of a person in sudden heat or passion, upon sufficient legal provocation. The distinction between murder and manslaughter is, that in murder the killing is done with malice, in manslaughter without malice. Malice, in the common acceptance of the term, as used in every-day talk, frequently means ill-will entertained by one towards another; but in law malice means the doing of an unlawful act without justification or excuse. Malice need not exist for any definite period of time, nor does the law fix any time in which it must exist, to be recognized in law. For instance, malice, if clearly formed in the mind of an individual, though it exist but for an instant, for a moment, is as clearly defined and constitutes malice in law as much as though that evil intent had been cherished or entertained for a week.

“Whenever a killing of a human being is done with malice aforethought, then it is murder. Where it is not done with malice aforethought, either express or implied, but is done in sudden heat and passion, upon sufficient legal provocation, then it is reduced from the higher offense of murder to the lower offense of manslaughter. But note that in manslaughter there must not only be the sudden heat and passion, but it must be superinduced by a sufficient legal provocation. No words, however hard to be borne, however cruel, constitute a legal provocation, and the man, no matter how great the heat

and passion may be, who slays his fellow-man upon no other provocation than mere words is guilty of murder.

“Murder also consists in this: when a man attempts to do an unlawful act, and especially when he uses unlawful means in accomplishing that act, he is responsible in law for the consequences of his own act. By way of illustration: if A intends to shoot B, and draws a pistol and fires upon B, intending to murder him, but misses B and strikes C, though it be his best loved one, then A is guilty in law of the murder of C, if the death was brought about while attempting to commit an unlawful act. In the eye of the law, self-destruction — suicide — is an offense; it is an unlawful act; and if a man with a deadly weapon undertakes to take his own life, he is doing an unlawful act, and if, in the commission or attempted commission of that act, he takes the life of an innocent party standing by, then, in the eye of the law, that is murder.

“I have charged you so far on the ground that the person acting is presumed to be a man of sane mind, — that is, a man with his senses about him. What I shall say about insanity and other matters connected with this case will be in connection with the requests to charge.

“The solicitor requests me to charge: —

“1. ‘Every man is presumed to be sane.’ That is good law.

“2. ‘When one has been proved to be insane, the presumption is, that he so continues until it is proved that he has recovered his sanity; but there is no presumption that fitful and exceptional attacks of insanity are continuous. It is only insanity of a chronic or permanent nature which, on being proved, is presumed to continue.’ I charge you that, with this modification: where a party is adjudged, under any of the methods known to the law, as being insane, the presumption is that the insanity continues; and when a person is subject to periods of insanity, as it were, the law leaves the question open whether or not any act committed was done in a lucid interval or in the course of the disease.

“3. ‘The overwhelming barbarity of the act will not be admitted as a presumption of insanity.’ I charge you that as good law.

“4. ‘When insanity is interposed by a defendant as a defense, under a plea of not guilty in a criminal prosecution, the defense must be proved by a preponderance of evidence.’ That I charge you as good law.

"5. 'A person who knows the difference between right and wrong—that his act of homicide is morally a crime, and punishable by law—cannot relieve himself from the consequences of murder by showing that he acted under an uncontrollable impulse.' I charge you that also.

"6. 'Where the killing is proved, and no more, the law will imply malice and make the act murder; and when all the facts and circumstances of the killing are in evidence, then the jury must say, from the testimony, what was the intention with which the act was committed, then it becomes a matter of proof, and there is no longer any implication.' I charge you that, because all presumptions of law are intended as aids to reach a conclusion; but when the testimony is before the jury, the necessity for presumptions of law as to the meaning of that testimony, ordinarily speaking, no longer exists, and you are to judge of the testimony as it addresses itself to your judgment and discretion.

"7. 'If the act which produced death be attended with such circumstances as indicate a wicked, depraved, and malignant spirit, the law will imply malice, without reference to what was passing in the prisoner's mind at the time.' That is good law.

"8. 'No amount of eccentricity or queerness is sufficient to excuse a criminal act.' I charge you that, because eccentricity is not insanity. Queerness is not insanity,—not necessarily so. A man may be eccentric and he may be queer, but it does not follow necessarily that he is insane.

"9. 'Malice will also be inferred from the use of a deadly weapon.' That is a presumption or rule not so much of law as of common sense. Ordinarily, if a man in his senses uses a deadly weapon in a way calculated to do great harm to another person, the law and common sense says that he intended the result which his act brought about.

"The defendant requests me to charge as follows:—

"1. 'The jury are instructed that the state is bound to make out all the essential elements of the crime charged beyond a reasonable doubt, and until this is done the accused is in no danger.' I grant that request.

"2. 'The jury are instructed that the state, which affirms the malice, must in all cases prove it.' I charge that.

"3. 'The jury are instructed that the failure of the state to show a motive for a crime is a circumstance to be duly considered by the jury in weighing the question of guilt.' That

is good law. The motive which actuates a man's mind can sometimes be ascertained from his speech or from his acts, but sometimes the motive which impels him to act is not discoverable by the testimony; and while that motive may be a question which the jury, like all other questions of fact, should weigh in reaching their conclusion, it is not absolutely necessary that the jury shall ascertain precisely the motive which actuated the defendant.

"4. 'The jury are instructed that where the state fully proves a *prima facie* case, and a special defense, such as insanity, is interposed, it must be established only by such a preponderance of evidence as will satisfy the jury that the charge is not sustained beyond all reasonable doubt. If so established, the defendant should be acquitted.' That is good law. It is copied from one of our supreme court decisions, and is, of course, correct.

"5. 'The jury are instructed that when the defendant undertakes to prove insanity, the rule is, that he shall not be required to prove it beyond a reasonable doubt, but by such preponderance of testimony as will overcome the legal presumption of sanity which attaches to every citizen of sufficient age who has not been adjudged a lunatic.' That is good law. It is taken from a decision of our supreme court, and is binding upon this court.

"6. 'The jury are instructed that this question of sanity is one solely for the determination of the jury, and that upon this issue, as upon every material issue in the case, and upon the whole case, the accused is entitled to the benefit of every reasonable doubt.' I charge you that.

"7. 'The jury are instructed that if the accused was under such defect of reason from disease of mind as not to know the nature of the act he was doing, or not sufficiently conscious to know that his act was criminal, or was led by an uncontrollable impulse to commit suicide, he is not responsible, and should be acquitted.' That I decline to charge, and I prefer to charge you in the language of our own courts. Where a person sets up the defense of insanity, the court says: In order to relieve himself from responsibility for a criminal act by reason of mental unsoundness, he, the prisoner, must show that he was under a mental delusion by reason of mental disease, and that at the time of the act he did not know that the act he committed was wrong or criminal or punishable, either the one or the other; because, notwithstanding his mind may be diseased,

if he is still capable of forming a correct judgment as to the nature of the act, or as to its being morally or legally wrong, he is still responsible for his act, and punishable as if no mental disease existed at all.

"8. 'The jury are instructed that the law does not require that the insanity which absolves from crime should exist for any definite period, but only that it exists at the moment when the act occurred with which the accused stands charged.' That is correct. Insanity is a question of fact. The gist of the question is, Was the man insane or not?

"9. 'The jury are instructed that the humane as well as just doctrine is, that a reasonable doubt should avail a prisoner in a defense of insanity, as much as in any other fact.' That is correct. That reasonable doubt accompanies the prisoner all through the case, and applies in an insanity case as well as any other. But it must be a reasonable, serious, substantial doubt, growing out of the testimony you have heard in the case."

*O. S. Bissell, for the appellant.*

*Jervey, solicitor, contra.*

McIVER, J. The defendant was indicted for and convicted of the murder of his wife, and judgment having been entered on the verdict, he appeals upon the following grounds: "1. Because his honor erred in charging the jury that 'malice will also be inferred from the use of a deadly weapon,' and that intent and malice are one and the same thing, when there is no presumption or inference of law, unless it is a natural and reasonable presumption from the facts proved; 2. Because the charge of his honor, 'that no words, however cruel, and the man, no matter how great the heat and passion may be, who slays his fellow-man upon no other provocation than mere words is guilty of murder,' is not in accordance with the modern doctrine of our law, was not applicable to the case, and was very misleading to the jury; 3. Because his honor erred in charging the jury that every death that results from the unlawful act of another is murder; 4. Because the charge of his honor was otherwise contrary to law."

The charge of Judge Aldrich, before whom the prisoner was tried, is set out in the "case," and should be incorporated in the report of this case. We will therefore proceed to consider the several grounds of appeal in their order as stated, only re-

ferring to such portions of the charge as will be necessary for a proper understanding of the questions raised and considered.

The first ground presents two questions: 1. Whether there was any error in saying to the jury that "malice will also be inferred from the use of a deadly weapon"; 2. Whether intent and malice are one and the same thing, provided it shall first appear that the judge so instructed the jury. As to the first question, it will be observed that the words there quoted were not used by the circuit judge, but are taken from the language of the solicitor's ninth request, to which the judge responded in these words: "That is a presumption or rule not so much of law as of common sense. Ordinarily, if a man in his senses uses a deadly weapon in a way calculated to do great harm to another person, the law and common sense says that he intended the result which his act brought about." The rule is well settled that every sane man is presumed to intend the ordinary and probable consequences of any act which he purposely does; and this rule is applied even in capital cases: 3 Greenl. Ev., secs. 13, 14. This is plainly what the judge meant by the language he used, and therefore there was no error in this respect. But even if it be assumed that the judge must be regarded as adopting the language used in the solicitor's ninth request, quoted above, we still think there was no error. In 2 Bishop's Crim. Law, sec. 680, it is said: "As a general doctrine, subject, we shall see, to some qualification, the malice of murder is conclusively inferred from the unlawful use of a deadly weapon, resulting in death." And to the same effect see 3 Greenl. Ev., secs. 145, 147. This doctrine has also been recognized in this state: See *State v. Toohey*, 2 Rice's Digest, 105; *State v. Ferguson*, 2 Hill, 619; 27 Am. Dec. 412; *State v. Smith*, 2 Strob. 77; 47 Am. Dec. 589. It is true that the inference of malice drawn from the use of a deadly weapon may be rebutted by testimony, but in the absence of any such testimony malice may be and is inferred from the use of a deadly weapon, causing death.

The second inquiry arising under the first ground of appeal is as to the identity of intent with malice. But we do not find anything in the charge of the judge which warrants the idea that any such instruction was given to the jury. The jury were instructed that if the act which produced death be attended with such circumstances as indicate a wicked, depraved, and malignant spirit, the law will imply malice without reference to what was passing in the prisoner's mind at the time,

and this was good law, as it was taken, word for word, from the opinion of the court in *State v. Smith*, 2 Strob. 77; 47 Am. Dec. 589.

The second ground of appeal likewise presents three inquiries: 1. Whether provocation by words only will be sufficient to reduce a killing from murder to manslaughter; 2. Whether the language complained of in this ground was applicable to the case; 3. Whether it was misleading to the jury. We will first consider the last two questions, which are really one, for we suppose that the language objected to as misleading is thought to be so because not applicable to the case as made by the testimony. But as none of the testimony is incorporated in the "case," and the record does not furnish us with even a general outline of the circumstances attending this deplorable tragedy, it is impossible for us to say that these remarks were either inapplicable to the case made, or calculated to mislead the jury. On the contrary, we are bound to assume that they were applicable, as we cannot suppose that the circuit judge, in instructing the jury as to their duties in so grave a case, would allow himself to indulge in general observations that had no application to the case, and might therefore tend to distract the minds of the jury from the real issues they were to pass upon.

Turning, then, to the first inquiry, it will be observed that the judge, after explaining to the jury the difference between murder and manslaughter, used the language objected to, probably for the purpose of disabusing their minds of what seems to be a popular impression, that where the killing is done in sudden heat and passion, the crime will be manslaughter, and not murder, without reference to the provocation received. It was, then, very natural for him to go on and explain the nature of such provocation as would or would not be sufficient to reduce the killing from murder to manslaughter. It was in this connection that the jury was instructed, correctly as we think, that provocation by words only, no matter how opprobrious, would not be sufficient. That this has been the law of this state from time immemorial cannot be questioned, and we are not aware that any such modern doctrine as that contended for has ever been recognized in this state. On the contrary, one of the recent decisions of this court (*State v. Jacobs*, 28 S. C. 29) expressly holds the contrary. This broad statement of the doctrine must be understood as applying to a case where death was caused by the use of a deadly weapon, as it may



be different where the death results from the use of some agency not likely to produce death, as, for example, from a blow with the fist. But although, as we have said, there is nothing in the record furnished us to show the circumstances attending the homicide, yet the fact that the death in this instance was caused by the use of a deadly weapon sufficiently appears, as well from the judge's charge as from the agreement to amend the "brief," made at the hearing, by stating that the prisoner fired two shots. We do not think, therefore, that the second ground of appeal can be sustained.

The third ground of appeal rests upon a misconception of the judge's charge. Indeed, it seems to be conceded in the argument of appellant's counsel, that the judge did not state, in terms, to the jury the proposition there excepted to, but that such is the inference to be drawn from the language used by him. We do not think that any such inference could properly be drawn from the language used. On the contrary, as it seems to us, the plain meaning of the proposition stated to the jury was, that the law will imply that a person who does an unlawful act intended the natural and probable consequences of his unlawful act, and is therefore responsible therefor; and when read in connection with the illustration given,— of A, intending to shoot B, fires upon him, intending to murder him, but misses B and kills C, then A would be guilty of murder, although he may not have had the slightest intention of killing C, or even injuring him in any way,—the jury could not possibly have had a doubt as to the meaning of the proposition, which was clearly correct, as was held in *State v. Smith*, 2 Strob. 77; 47 Am. Dec. 589.

The other illustration given by the judge, of one killing another in an attempt to commit suicide, and commented on by counsel for appellant in his argument here as presenting an incorrect view of the law, will be considered, though the "case," as prepared for argument here, contains nothing from which it can be inferred that there was any evidence out of which such a question could be raised. It is true that counsel, in his argument, does say that, according to the evidence, the defendant attempted to kill himself, and in doing so unfortunately killed his wife, who was attempting to prevent the suicidal act. But as we have often held that we cannot decide a case upon any testimony stated only in argument, and not appearing in the "case" prepared for a hearing in this court, this matter is not properly before us. Inasmuch, however, as

this is a case involving such grave consequences, we are not unwilling to depart from the well-settled rule, and consider the propriety of what was said to the jury upon the subject of suicide, although there is no exception to that part of the charge.

The judge used this language in his charge: "In the eye of the law, self-destruction — suicide — is an offense; it is an unlawful act; and if a man with a deadly weapon undertakes to take his own life, he is doing an unlawful act, and if, in the commission or attempted commission of that act, he takes the life of an innocent party standing by, then, in the eye of the law, that is murder." To this instruction there is no well-founded exception. In 1 Russell on Crimes, 3d Am. ed., 424, it is said: "Whenever an unlawful act, an act *malum in se*, is done in prosecution of a felonious intention, and death ensues, it will be murder." Now, as suicide is an unlawful act, *malum in se*, and is a felony (1 Bishop's Crim. Law, secs. 511–615), there can be no doubt that the proposition laid down by the judge is correct. We have carefully examined the case of *Commonwealth v. Mink*, 123 Mass. 422, 25 Am. Rep. 109, cited by counsel for appellant on this point, and we do not think it is applicable, for the reason that in the state of Massachusetts they have a statute providing that "any crime punishable by death or imprisonment in the state prison is a felony, and no other crime shall be so considered." Suicide, therefore, is not a felony in that state, as from the very nature of the case it cannot be punishable "by death or imprisonment in the state prison"; and yet in that very case, Gray, C. J., in delivering the opinion of the court, intimates pretty plainly that one who, in an unsuccessful attempt to commit suicide, unintentionally kills another who is endeavoring to prevent it, is guilty of murder. But in this state we have no such statute and on the contrary, section 2678 of the General Statutes, prescribing the form of the verdict of a coroner's inquest in a case of suicide, by the use of the term "feloniously," expressly recognizes it as retaining its common-law character as a felony.

The fourth ground of appeal is too general to require attention. Nevertheless, *in favorem vitæ*, we will not decline to consider such questions as we can gather from the argument were intended to be raised by that ground. The first is as to the doctrine of moral insanity, as it is sometimes called, or uncontrollable impulse. While it is not to be denied that there are cases in some of the states which recognize this doc-

trine as a defense against a charge of crime, yet it never has, and we trust never will, obtain a foothold in this state; for we agree with Judge Sherwood when he said in the recent case of *State v. Pagels*, 92 Mo. 800: "It will be a sad day for this state when uncontrollable impulse shall dictate a rule of action to our courts." It is a matter that is not susceptible of proof, and to allow a person to escape the consequences of his criminal act by asserting that he acted under an impulse which he could not restrain, although he knew his act to be unlawful, would be dangerous, if not destructive, to the peace of society: See *State v. Bundy*, 24 S. C. 444, 445; 58 Am. Rep. 262; *State v. Alexander*, 30 S. C. 74; 14 Am. St. Rep. 879. See also *Leach v. State*, 22 Tex. App. 279, reported also in 58 Am. Rep. 638, where the question is ably and elaborately discussed, and the ruling was in conformity to the view we have adopted. In *Parsons v. State*, 81 Ala. 577, to be found also in 60 Am. Rep. 193, the whole subject of insanity as a defense is most ably and elaborately discussed, and both sides of the question more immediately presented here will be found fully presented in the opinion of the court delivered by Somerville, J., and the dissenting opinion by Stone, C. J.

Under this ground the appellant's counsel further objects to the definition of malice as given by the circuit judge, because it omits the word "intentionally," and claims that a correct definition should read: "Malice means the doing of an unlawful act intentionally, without justification or excuse." Perhaps this criticism might be well founded if we confined our attention solely to the particular sentence upon which it is based; but when the whole charge is considered together, as the rule requires it to be, there is plainly no foundation for the exception. From what we can discover as to the nature of the case in which this charge was made, as well from the record as the argument here, it does not seem to us that the omission of this qualifying word in defining the word "malice" could possibly have prejudiced the prisoner. As we have seen, the law presumes that a person intends the natural and probable consequences of his own act, and it is for the party charged to show the absence of intention. Hence, when it is shown that one has taken the life of another without justification or excuse, the law will imply malice, without reference to what was actually passing in the prisoner's mind at the time he committed the homicide.

The judgment of this court is, that the judgment of the cir-

cuit court be affirmed, and that the case be remanded to that court for the purpose of having a new day assigned for the execution of the sentence heretofore imposed.

**CRIMINAL LAW — INTENT — PRESUMPTION.** — One is presumed to have intended the probable consequences of an act by him intentionally done: *Hipl v. State*, 26 Tex. App. 545; 8 Am. St. Rep. 488; *Commonwealth v. York*, 9 Met. 93; 43 Am. Dec. 373; *Collier v. State*, 39 Ga. 31; 99 Am. Dec. 449. A killing must be presumed to have been intended where one was killed with an instrument likely to produce death: *Weeks v. State*, 79 Ga. 36. A malicious killing implies an unlawful motive: *Story v. State*, 68 Miss. 609. An unlawful act is presumed to have been committed with an unlawful intent: *People v. Ah Gee Yung*, 86 Cal. 144.

**MALICE — USE OF DEADLY WEAPON.** — A killing by means of a deadly weapon raises the presumption of malice: Note to *State v. Deschamps*, 21 Am. St. Rep. 399; and defendant has the burden of rebutting such presumption: *Brown v. State*, 83 Ala. 33; 3 Am. St. Rep. 685.

**MALICE, PROOF OF.** — Malice necessary to constitute a killing murder is a question of fact for the jury, and need not be expressly shown, but may be inferred from the circumstances of the case: *Yates v. State*, 26 Fla. 484; *Hicks v. State*, 25 Fla. 535.

**MURDER — MANSLAUGHTER.** — Mere words, however aggravating, are not considered sufficient provocation to reduce a killing from murder to manslaughter: *Levy v. State*, 28 Tex. App. 203; 19 Am. St. Rep. 826, and note; *State v. Howard*, 102 Mo. 142; *People v. Carlton*, 115 N. Y. 618; *State v. Jacobs*, 28 S. O. 29. But in *Pitts v. State*, 29 Tex. App. 374, it was decided that insulting words of the deceased used toward a female relative of the accused might reduce a killing to manslaughter, where it appeared that the killing took place immediately after the utterance of such insults, or as soon thereafter as accused met the deceased after having heard of them. To reduce a murder to manslaughter, upon the ground of sudden quarrel, it must appear that the accused acted under the smart of his sudden passion, where there was provocation of such a nature as would be naturally calculated to arouse one's passions and resentment: *People v. Bruggy*, 93 Cal. 476.

**HOMICIDE COMMITTED IN THE PERPETRATION OF A FELONY**, or in an attempt to perpetrate a felony, is murder: *State v. Deschamps*, 42 La. Ann. 567; 21 Am. St. Rep. 392; *Butler v. People*, 125 Ill. 641; 8 Am. St. Rep. 423; even though the killing may have been unintentional: *Holmes v. State*, 88 Ala. 26; 16 Am. St. Rep. 17, and note; *State v. Barrett*, 40 Minn. 77; *State v. Meyers*, 99 Mo. 107; such as the accidental killing of one by a person who is attempting to commit suicide: *Commonwealth v. Bowen*, 13 Mass. 356; 7 Am. Dec. 154; *Commonwealth v. Mink*, 123 Mass. 422; 25 Am. Rep. 109, and foot-note.

**CRIMINAL LAW — INSANITY AS A DEFENSE TO CRIME.** — In *People v. McElvaine*, 125 N. Y. 597, is given a history of the legislation concerning insanity as a defense to crime. See also monographic note to *State v. Marler*, 36 Am. Dec. 402-411. A temporary dethronement of reason, caused by passion or recent intoxication, will not avoid criminal responsibility: *State v. Alexander*, 30 S. O. 74; 14 Am. St. Rep. 879; *Williams v. State*, 50 Ark. 511; *Plake v. State*, 121 Ind. 433; 16 Am. St. Rep. 408, and note; *Guetig v. State*, 66 Ind. 94; 32 Am. Rep. 99; *State v. Wilson*, 104 N. O. 868; *People v. Traversa*,

63 Cal. 233. As to moral insanity as a defense to crime, see *Scott v. Commonwealth*, 4 Met. 227; 83 Am. Dec. 461, and note; *Boswell v. State*, 63 Ala. 307; 35 Am. Rep. 20, and note 32-40; *Leach v. State*, 22 Tex. App. 279; 56 Am. Rep. 638; *People v. Hein*, 62 Cal. 120; 45 Am. Rep. 651.

## BURROWS v. FRENCH.

[34 SOUTH CAROLINA, 165.]

**STATUTE OF LIMITATIONS, CONSTRUCTION OF "RETURN TO STATE" IN SAVING CLAUSE OF.** — An action on a promissory note made in another state between parties resident there, brought against the maker within six years after his first removal to South Carolina, is not barred by the statute of limitations of that state, since the saving clause of that statute as to persons who "return" to the state includes a person who never was a resident of the state before, but for the first time comes within its limits and takes up his residence there.

**ACTION on a promissory note.** The opinion states the case.

*Perry and Heyward*, for the appellant.

*Westmoreland and Haynsworth*, contra.

**McIVER, J.** In this case there is no controversy as to the facts, and the single question presented is, whether the plaintiff's action, under the conceded facts, was barred by the statute of limitations. The action was on a note, dated the 20th of March, 1874, payable on demand, with interest annually, with a payment indorsed thereon, dated the 14th of December, 1879. At the time of the making of this note, both payee and maker were citizens of the state of New Hampshire, and the payee still resides there. The maker, however, some time after the execution of the note, but when precisely is not stated, left that state and eventually settled in this state, where he has been residing for a period of less than six years before the commencement of this action. This action was commenced on the 10th of June, 1890, and the plea of the statute having been interposed and sustained by the circuit judge, judgment was rendered in favor of defendant, and plaintiff appeals, alleging error in holding that the action was barred by the statute of limitations.

Inasmuch as it is apparent from this statement that, upon the face of the papers, the action would be barred by the statute of limitations, unless it falls within some one of the exceptions provided for in the statute, the only question is, whether it does come within any one of these exceptions. The only one

which it is suggested covers this case is that found in section 121 of the Code of Procedure, which reads as follows: "If, when the cause of action shall accrue against any person, he shall be out of the state, such action may be commenced within the terms herein respectively limited after the return of such person into this state; and if, after such cause of action shall have accrued, such person shall depart from and reside out of this state, or remain continuously absent therefrom for the space of one year or more, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action." Inasmuch as it is not pretended that the defendant, after the accrual of plaintiff's cause of action, departed from this state, it is very clear that the second clause of the section just quoted has no application, and it only remains to consider whether the first clause applies, and what is its effect.

It being conceded that the defendant was out of the state when the cause of action accrued, the inquiry is narrowed down to the question whether the plaintiff can avail himself of the privilege conferred by the latter part of the first clause, allowing the action to be brought within six years (that being the period limited by the code within which an action like this may be brought) "after the return of such person into this state"; and that turns upon the construction proper to be given to the word "return" as used in the section. On the one hand, the appellant contends that this word, as there used, should be so construed as to embrace a person who never was a resident of this state before, but for the first time comes within its limits and takes up his residence here; while the respondent contends that it must be confined to persons who, having once resided here, have gone abroad for a time, and have come back to the state. It is very obvious that if the construction contended for by appellant can be sustained, there was error in the ruling below, as it is conceded that the action was commenced within six years after the defendant came into this state. But on the other hand, if the construction contended for by respondent be the correct one, then it is equally clear that there was no error in the ruling below, for it is not claimed that the defendant ever did return to this state, in the strict sense of that word.

While it is true, so far as we are informed, that there is no decision in this state construing this particular section of the code, as no case involving the question has ever come before

this court since the adoption of the code, yet we are not without authority here upon the subject. In the case of *Alexander v. Burnet*, 5 Rich. 189, decided in 1851, a similar question to that now presented, involving the construction of very similar language, was considered by the former court of appeals, and it was there held that the provision of the statute of Anne, allowing a creditor to bring an action against his debtor, who was "beyond seas" (which it is well settled means beyond the limits of the state) at the time the cause of action accrued, at any time within a specified period after his return to the state, applies as well to foreigners residing abroad as to persons who, having once resided here, had gone abroad and then returned to this state. In that case, Evans, J., in delivering the opinion of the court, used this language: "It has been argued that the statute of Anne has no application to the case, because Alexander, being a citizen of another state, cannot be said to have returned to the state, and therefore the statute must relate only to the case of citizens who are absent for a time and then return. This may be the literal import of the words, but where the words of a statute have received a uniform construction, it is always safe to adhere to it. In 6 Bac. Abr., Bouvier's ed., 392, it is said 'the exceptions in the statutes of James and Anne as to persons beyond seas are not confined to Englishmen who may occasionally go beyond seas, but is general, and extends to foreigners who are constantly resident abroad': 3 Wils. 145. This is clearly the English law, and the same construction, I believe, has been uniformly put on the same or similar words in most or all the states." The same view was manifestly entertained by the court in *Lavasseur v. Ligniez*, 1 Strob. 826, though the precise question here presented was not decided in that case.

In *Ruggles v. Keeler*, 8 Johna. 263, 3 Am. Dec. 482, the same construction was adopted, and Kent, C. J., in delivering the opinion of the court, used these words: "Whether the defendant be a resident of this state, and only absent for a time, or whether he resides altogether out of the state, is immaterial. He is equally within the proviso. If the cause of action arose out of the state, it is sufficient to save the statute from running in favor of the party to be charged, until it comes within our jurisdiction. This has been the uniform construction of the English statutes, which also speak of the 'return' from beyond seas of the party so absent. The word 'return' has never been construed to confine the proviso to Englishmen



if he is still capable of forming a correct judgment as to the nature of the act, or as to its being morally or legally wrong, he is still responsible for his act, and punishable as if no mental disease existed at all.

"8. 'The jury are instructed that the law does not require that the insanity which absolves from crime should exist for any definite period, but only that it exists at the moment when the act occurred with which the accused stands charged.' That is correct. Insanity is a question of fact. The gist of the question is, Was the man insane or not?

"9. 'The jury are instructed that the humane as well as just doctrine is, that a reasonable doubt should avail a prisoner in a defense of insanity, as much as in any other fact.' That is correct. That reasonable doubt accompanies the prisoner all through the case, and applies in an insanity case as well as any other. But it must be a reasonable, serious, substantial doubt, growing out of the testimony you have heard in the case."

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*Jervey, solicitor, contra.*

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The second inquiry arising under the first ground of appeal is as to the identity of intent with malice. But we do not find anything in the charge of the judge which warrants the idea that any such instruction was given to the jury. The jury were instructed that if the act which produced death be attended with such circumstances as indicate a wicked, depraved, and malignant spirit, the law will imply malice without reference to what was passing in the prisoner's mind at the time,

from burning; that the plaintiff, standing at the machine, was supplied by other servants of the defendant company with bags or sacks, which plaintiff, with the assistance of another, had to place in the machine; that these bags or sacks were placed in a pile on the top of the machine, and when one was wanted, the plaintiff reached up and took one off the pile, which had to be done with rapidity; that it was very necessary for the safety of the person operating the machine that these bags or sacks should be free from holes or rents, and therefore another person was employed to repair any torn sacks; that the disaster which gave rise to this action probably resulted from the use of a sack with a hole in it, whereby plaintiff's finger became entangled in it and his hand was crushed. There was also some testimony tending to show that if the person operating the machine discovered any hole or rent in the sack when taken off the pile, he would throw it over his shoulder, when it would be taken to the person charged with the duty of repairing the sacks.

Upon the testimony thus briefly outlined, his honor Judge Wallace held that there was an entire absence of any testimony tending to show any negligence on the part of the defendant company, and therefore rendered a judgment of nonsuit, from which the plaintiff appeals, upon the grounds set out in the record, which make the single question whether there was such an entire absence of testimony tending to show negligence on the part of the defendant as would warrant the granting of a nonsuit.

The rule is well settled, that it is the duty of the master to furnish safe and suitable appliances for the performance of the work required of the servant, and also to see that the same are kept in proper repair, and hence, where either of these duties has not been performed, there is an omission of duty on the part of the master, which affords at least *prima facie* evidence of negligence on his part; for these duties cannot be delegated to another so as to relieve the master from liability to another for injuries sustained by reason of a failure to perform them properly: *Gunter v. Graniteville Mfg. Co.*, 18 S. O. 262. This general statement of the rule is not to be construed as implying that the master is bound to provide appliances which shall prove to be absolutely safe under all contingencies, or even such as are of the best and most approved description; but, as said in the case cited, "only such as a reasonable and prudent person would ordinarily have used under similar cir-

cumstances." In other words, the rule does not require of the master the greatest care possible, but only such as prudent persons usually exercise under similar circumstances.

This being the rule, the inquiry is, whether there was in this case any evidence tending to show an absence of such care on the part of the defendant; not whether the testimony adduced was sufficient to prove negligence, as that is a matter exclusively for the jury, and we have neither the power nor the disposition to consider that question. It seems to us that there was some testimony tending to show an omission of duty on the part of the master in furnishing the plaintiff with safe appliances to do the work required of him, for there is some testimony tending to show that the injury complained of resulted from the fact that the plaintiff was furnished with a torn sack, and also some testimony to show that the use of such a sack was dangerous. It is true that there is also testimony tending to show that the defendant had employed another person charged with the special duty of repairing the sacks; yet if it shall appear that this duty was negligently performed, such negligence would be imputable to the master under the rule above stated, which requires that the master shall not only provide safe and suitable appliances in the first instance, but also see that the same are kept in repair, and the delegation of this duty to another cannot relieve the master from responsibility.

The circuit judge seemed to base his conclusion upon the fact that the testimony not only did not tend to show that the defective sack which was used was the only one furnished, but on the contrary, there was evidence tending to show that a number of other sacks were furnished, some of which he assumed were free from any defect, and hence no negligence could be imputed to defendant causing the injury complained of, as plaintiff had been furnished with good sacks, and it was his own act to use one that was defective; citing and relying on the case of *Davis v. Columbia etc. R. R. Co.*, 21 S. C. 93. Before proceeding to point out the distinction between this case and that of *Davis*, we may remark that the view taken by the circuit judge seems to be based upon the idea that Carter, the plaintiff, was guilty of contributory negligence, and therefore could not maintain his action. It may be that such was the fact, but it is well settled, in this state at least, that the question of contributory negligence cannot be considered under a motion for a nonsuit.

But again, the rule is, that it is the duty of the master, and not of the servant, to exercise due care and diligence to ascertain whether the appliances furnished are safe and suitable; and a servant has a right to assume, without inquiry or examination, that the appliances furnished him are safe and suitable: *Lasure v. Graniteville Mfg. Co.*, 18 S. C. 281. Of course, if he uses a machine or other appliance, knowing at the time that it is out of repair to such an extent as to render it unsafe, then another rule applies, with certain qualifications which it is needless to state here.

It does not seem to us that the case of *Davis v. Columbia etc. R. R. Co.*, 21 S. C. 93, relied upon by the circuit judge, applies: See *Altes v. South Carolina R'y Co.*, 21 S. C. 557. In that case, the plaintiff was on top of the train waving his lantern as a signal to an approaching train, when the cup of his lantern fell out. The plaintiff, however, did not then sustain the injury complained of; but by reason of the loss of the cup of his lantern, he had to descend into the cab to procure another, and in returning to his post on the top of the train was struck by the projecting timbers of a tank, while ascending the ladder leading to the top of the car. The question whether there was any negligence on the part of the company in furnishing the plaintiff with a defective lantern was decided upon the ground that there was really no evidence that the lantern from which the cup dropped was defective, except the simple expression of opinion by one of the witnesses that the cup dropped out because of a defect in the lantern. That might very well have happened from some other cause than a defect in the lantern, and no witness testified that he had ever examined or even seen the lantern in question.

It is true that the late chief justice, in delivering the opinion of the court, after commenting on the fact that there was no evidence tending to show any defect in the lantern, does use this language: "We find not a word in the testimony on that subject, at least none to the precise point necessary to inculcate the defendant, to wit, that the deceased was using a defective lantern because of the fact that defendant had negligently furnished him with such; on the contrary, it appears that the deceased procured another from the cab, which we suppose was safe and perfect, as there is no testimony to the contrary. He might have taken that one at the first. That he did not was perhaps his own negligence rather than that of the company. We think there was an entire absence of all

testimony directed to the negligence of the company as to the lantern." It is obvious that this language was not used for the purpose of laying down the doctrine that it was the duty of the servant to examine the appliances provided by the master for his use, as that would be inconsistent with the decision in Lasure's case, and certainly not for the purpose of indicating that the doctrine of contributory negligence could be considered on a motion for a nonsuit, as that would have been in conflict with numerous cases then recently decided; but it was only designed to show that in addition to the fact that there was no evidence to show that the defendant company had furnished the plaintiff with a defective lantern; the evidence, on the contrary, tended to show that safe and suitable lanterns had been furnished by the company for the use of its servants, and if there was any fault at all, it lay with the plaintiff rather than the defendant. Besides, in this case, the testimony tended to show that the work required of the plaintiff had to be done so quickly as to afford no time or opportunity for him to examine the sacks furnished him, whereas it was not so in the case of the lanterns.

The judgment of this court is, that the judgment of the circuit court be reversed, and that the case be remanded to that court for a new trial.

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**MASTER AND SERVANT.** — It is a master's duty to furnish his servant with reasonably safe and suitable machinery, proportionate to the dangers that may reasonably be anticipated; *Carlson v. Phoenix B. Co.*, 132 N. Y. 273; *Gasreau O. Co. v. Palmer*, 28 Neb. 307; *St. Louis etc. R'y Co. v. McClain*, 80 Tex. 85; *U. P. R. Co. v. Broderick*, 80 Neb. 735; *Humphreys v. Newport etc. R'y Co.*, 33 W. Va. 135; and to use due care in keeping the same in repair: *Nall v. Louisville etc. R'y Co.*, 129 Ind. 260; and he cannot escape liability by delegating the performance of this duty to another: *Ell v. Northern P. R. Co.*, 1 N. D. 336; 26 Am. St. Rep. 621, and note. The master need not supply any particular kind of appliances: *Bohn v. Chicago etc. R'y Co.*, 106 Mo. 429; nor machinery suitable for a purpose not designed, or which could not have been contemplated by the master: *Kauffman v. Maier*, 94 Cal. 269; his whole duty being only to use as much care in the furnishing of appliances as an ordinarily prudent man would use under similar circumstances: *Carlson v. Phoenix Bridge Co.*, 132 N. Y. 273. The master's duty to keep appliances in repair does not require him to do such things as are properly a part of the servant's duty, and incident to the service required of him: *Jennings v. Iron Bay Co.*, 47 Minn. 111.

**NEGLIGENCE — QUESTION OF FACT.** — Negligence is ordinarily a question of fact for the determination of the jury: *Summers v. Bergner B. Co.*, 143 Pa. St. 114; 24 Am. St. Rep. 518; *Deans v. Wilmington etc. R. R. Co.*, 107 N. C. 686; 22 Am. St. Rep. 902, and note; *Emry v. Raleigh etc. R. R. Co.*, 109 N. C. 589; *Foley v. Riverside etc. Co.*, 85 Mich. 7; *Anderson v. North Pacific etc. Co.*, 21

Or. 281; *Evans v. Lake Shore etc. R. R. Co.*, 88 Mich. 442; *Dillingham v. Parker*, 80 Tex. 572. But it is for the court to determine whether there is any evidence from which negligence can be inferred: *Latremonville v. Bennington etc. R'y Co.*, 63 Vt. 336.

**NONSUIT, WHEN SHOULD BE REFUSED.** — A nonsuit should be refused if there is any substantial evidence produced by plaintiff which should be weighed and considered by the jury: *O'Brien v. Miller*, 60 Conn. 214; 25 Am. St. Rep. 320, and note; *Anderson v. North Pacific etc. Co.*, 21 Or. 281; *Evans v. Lake Shore etc. R. R. Co.*, 88 Mich. 442.

**MASTER AND SERVANT.** — As to how far a servant may rely upon the superior knowledge of his master, see *Shortel v. St. Joseph*, 104 Mo. 114; 24 Am. St. Rep. 317, and note 320-323.

**MASTER AND SERVANT.** — A servant has a right to assume that the master has performed his duty with respect to supplying safe and suitable appliances: *Chicago etc. R. R. Co. v. Hines*, 132 Ill. 161; 22 Am. St. Rep. 515, and note.

## EX PARTE HARDIN. IN RE MCLURE v. MELTON.

[24 SOUTH CAROLINA, 377.]

**SUBROGATION — WARRANTY — LIMITATIONS — INJUNCTION.** — A sold a lot of land, upon which there was a judgment lien, to B, taking notes secured by a mortgage for the purchase price. When the notes matured they and the mortgage were canceled and surrendered to B, who gave to A a written unsealed agreement, whereby he assumed the payment of this judgment. Afterwards B conveyed said lot, with the usual covenants of warranty, to trustees for the benefit of his wife and children, in consideration of love and affection. These trustees conveyed the lot, as they were duly authorized to do, to C for value, without warranty, who took without knowledge of the agreement between A and B, but with notice of the judgment. C subsequently conveyed the lot to D with warranty. The lot having been levied upon, and being about to be sold under the judgment, C paid the amount of the judgment. Afterwards, in a cause pending for the settlement of the estate of B, who had in the mean time died insolvent, C filed a petition, wherein he sought to recover the amount paid by him in exoneration of his covenant of warranty to D. Held: 1. That as the payment of the judgment by C was not made for the purpose of relieving A, but solely in order to perform C's covenant of warranty, C had no right in equity to be subrogated to the rights of A or of the holder of the judgment; that as the judgment was against A, and not against B, who was never liable to pay the amount thereof as a judgment, but only liable by reason of his agreement with B, the judgment could in no event be set up as a judgment against the estate of B. 2. That the mortgage could not be set up as a mortgage except against the property mortgaged, but only, if at all, as of the rank of the sealed notes which it secured; that since these notes were extinguished by the agreement between A and B, they could not now constitute any legal cause of action against B's estate, and C had no connection with any equities that A may have had in the matter. 3. That C could not claim as assignee of the covenant of warranty contained in the deed from A to



B, nor could he have any claim against the estate of B as assignee of the covenant of warranty contained in the deed from B to the trustees, for as that was a voluntary deed, and as the measure of damages for breach of a covenant of warranty is the amount of the purchase-money paid, with interest from the time of the alienation, where nothing was paid, nothing could have been recovered. 4. That the agreement between A and B, whereby B assumed the payment of the judgment, was for the benefit of A solely, and C had no connection with it, and acquired no rights under it. 5. That the position of C was that of a purchaser of real estate under a quitclaim deed without warranty, upon which there rested the lien of a judgment of which he had notice when he purchased, who removed such lien by payment in order to protect himself against an action for breach of his covenant of warranty in his deed to his vendee, and that he had therefore no cause of action against the estate of B. 6. That even if C could have connected himself with the agreement between A and B, an action upon the promise of B was barred in six years, which period had elapsed long before the petition in this case was filed. 7. That the order calling in the creditors of B and enjoining suits at law did not prevent the running of the statute of limitations against claims that should have been presented as claims against his estate.

PETITION to be allowed to establish a claim against an estate. The following is the decree of the circuit judge, referred to in the opinion: "The cause entitled J. J. McLure, administrator of M. A. Melton, and others, was instituted by the administrator of George W. Melton, to facilitate the settlement of the estate of G. W. Melton, which was insolvent. Creditors of the estate were enjoined from proceeding against it, save through that action, and were required to establish their demands in it. W. Holmes Hardin claims to be a creditor of the estate, and seeks by this petition to be allowed to establish his demand. The facts upon which petitioner supports his demand are as follows: On the 25th of November, 1867, C. D. Melton sold and conveyed to G. W. Melton a dwelling-house and land adjacent for a large sum of money. Notes were executed by G. W. Melton to C. D. Melton for the purchase price, and these notes secured by a mortgage of the premises. When the note which had the longest time to run matured, C. D. and G. W. Melton had a settlement on the 25th of November, 1871. It was agreed that G. W. Melton should assume the payment of several judgments which had been obtained against C. D. Melton prior to the conveyance of the house and land to G. W. Melton, and which were liens upon the property, and which in the aggregate were about equal in amount to the aggregate sum due upon G. W. Melton's notes. Upon this understanding, the notes and mortgage of G. W. Melton were canceled and given up to him. G. W. Melton, in pursuance of this

agreement, paid all the judgments which were liens upon the land, save one known as the Wright judgment. That judgment, at the time the others were paid, was in litigation, its validity as a lien being in controversy. Its validity as a lien was finally established. It was obtained on the 15th of November, 1867. In the mean time the house and land had been conveyed by G. W. Melton to trustees, with warranty, in trust for his wife and children. G. W. Melton died insolvent, and had not paid the Wright judgment. The trustees who had the title to the property asked and obtained leave of the court to sell it, with a view of making a more advantageous investment for the *cestuis que trust*. At the sale thus ordered, the petitioner here, W. Holmes Hardin, became the purchaser for the sum of five thousand dollars. In a little more than a year after his purchase he sold to another for the sum of six thousand dollars. All this while the Wright judgment was in litigation, and as before said, its validity and as a lien upon this house and land was finally established. All the time of these transfers this judgment had been of record in the register's office of Chester County, and upon the final determination of the contest as to it, W. Holmes Hardin's vendee, James C. Hardin (who had it under a warranty deed from W. Holmes Hardin), was in possession. After further litigation, which need not be set out here, the Wright judgment was levied upon the house and land. W. Holmes Hardin was informed by his vendee that he rested upon his warranty, and because there was no further ground of resistance, W. Holmes Hardin paid to the sheriff of Chester County the amount, principal, interest, and costs, of the Wright judgment, and thus made good his warranty to James C. Hardin. W. Holmes Hardin claims, upon this state of facts, that he is a creditor of the estate of G. W. Melton, and that he should be allowed to set up both the mortgage of G. W. Melton to C. D. Melton, and the Wright judgment which he has paid. The force of the mortgage of G. W. Melton to C. D. Melton related only to the house and land upon which it was a lien. To restore to it now all the force it ever had would not aid petitioner in the collection of a claim against G. W. Melton's estate, for it would not constitute a lien upon any property of that estate. The same may be said of the Wright judgment. That was a judgment against C. D. Melton, obtained in a proceeding to which G. W. Melton was not a party. The doctrine of subrogation cannot impart new and enlarged scope to instruments, but only pre-

vent extinguishment in support of an equity. It is the re-  
legation to another's right, nor is the right enlarged by the  
transfer. If, therefore, the mortgage and judgment were both  
restored to their original vigor, they could have no relation to  
the estate of G. W. Melton. G. W. Melton promised to pay  
the Wright judgment, and reserved money due C. D. Melton  
with which to do so. This promise did not make him liable  
on the judgment. The ground of his liability was his prom-  
ise. This promise was made in November, 1871, and of  
course has been long since barred by the statute of limita-  
tions. It is therefore ordered that the prayer of the petitioner  
be denied."

And the following are the appellant's exceptions, referred to  
in the opinion: —

"1. Because his honor erred in holding that the petitioner  
had no right to prove the amount paid by him in satisfaction of  
the Wright judgment against the estate of George W. Melton,  
when the petitioner was the assignee of the covenant of  
warranty of George W. Melton against encumbrances and for  
quiet enjoyment, and said covenant was broken by the levy  
of the execution issued on said judgment on the Chester prop-  
erty, and the payment of the same by the petitioner, and he  
was entitled to prove the same according to the rank of his  
said debt under the statute.

"2. Because the case of *J. J. McLure, administrator, v. M. A. Melton and others*, being still before the referee, the fund still  
in court arising from the sale of the real estate of the intestate,  
the administrator not having accounted for his administration,  
and there being a large sum of money in his hands undis-  
tributed, it was error in his honor not to allow the petitioner to  
prove in this action the breach of the covenant of warranty of  
George W. Melton, of which the petitioner was the assignee,  
and his payment of the Wright judgment as a debt against  
the estate of the said G. W. Melton.

"3. Because his honor erred in not holding that when W.  
Holmes Hardin paid the Wright judgment, he was entitled to  
be subrogated to all the rights which the estate of C. D. Mel-  
ton had in the agreement between C. D. and G. W. Melton of  
November 25, 1871, and through that instrument to prove it  
as a judgment debt against the estate of George W. Melton.

"4. Because when W. Holmes Hardin paid the Wright  
judgment, he paid the unpaid part of the purchase-money of  
the Chester real estate on which C. D. Melton held a mortgage

of G. W. Melton, and Hardin is entitled to be subrogated to all the rights of the former in said mortgage, and has a right to have it kept alive for his benefit, so that he may prove it against the estate of George W. Melton as a mortgage debt, and his honor erred in not so finding.

"5. That his honor erred in holding that the petitioner's claim was in any sense barred by the statute of limitations."

*S. P. Hamilton*, for the appellant.

*Giles J. Patterson and G. W. S. Hart*, contra.

McIVER, J. The principal case in which the petition of appellant has been filed was an action brought by the plaintiff, as administrator of George W. Melton, deceased, against his heirs and creditors, to marshal the assets of the estate of said George W. Melton, which is insolvent, and it was commenced on the 17th of July, 1877. On the 24th of August, 1877, an order was passed in said case enjoining all creditors of George W. Melton "from suing on said claims, or prosecuting their actions at law thereon against said administrator, until the further order of this court." On the 13th of October, 1877, another order was passed, whereby, amongst other things, all creditors were required to prove their demands before the clerk, on or before the 15th of January, 1878; and on the 14th of November, 1881, A. G. Brice was substituted as referee in place of the clerk, who, after holding several references, made his report on the 1st of February, 1884, ascertaining the debts proved, and classifying them according to their legal priorities. To this report some of the creditors filed exceptions to the classification adopted by the referee, and his report, with the exceptions thereto, came before his honor Judge Wallace, who, on the 20th of May, 1885, rendered judgment sustaining the exceptions, but in all other respects confirming the report of the referee. From that judgment some of the mortgage creditors appealed, and on the 22d of April, 1886, the supreme court rendered judgment affirming the judgment of Judge Wallace: *McLure v. Melton*, 24 S. C. 559; 58 Am. Rep. 272. The case was then carried, by writ of error, to the supreme court of the United States, where the writ of error was dismissed: *Hopkins v. McLure*, 133 U. S. 380. And the mandate from that court, together with the *remittitur* from the supreme court of this state, was filed in the circuit court on the 4th of June, 1890.

In the mean time the real estate of the said George W. Melton had been sold, and a considerable portion of the proceeds of such sale remain in the hands of the clerk; and it is conceded that there are assets yet in the hands of the administrator, who has not yet formally accounted. On the 25th of June, 1890, the appellant filed his petition in the cause, praying for leave to come in and prove his alleged claim against the estate of George W. Melton. His claim is based upon the following allegations contained in his petition: That Mrs. Wright, on the 15th of November, 1867, recovered a judgment against C. D. Melton, which became a lien on certain real estate in and adjoining the town of Chester; that on the 25th of November, 1867, C. D. Melton conveyed said real estate to his brother, George W. Melton, with general warranty, and received from his brother four notes under seal, bearing that date, and secured by a mortgage of the premises; that when the last of these notes became payable, to wit, on the 25th of November, 1871, an agreement in writing, not under seal, was entered into by the Melton brothers, whereby George W. Melton assumed the payment of certain specified judgments, including that in favor of Mrs. Wright, which had been previously obtained against C. D. Melton, and were liens upon said real estate, and thereupon the said C. D. Melton canceled and surrendered the said four notes, together with the mortgage to secure the payment of the same, to the said George W. Melton, but the record of said mortgage still remains uncanceled; that thereafter, to wit, in August, 1875, the said George W. Melton conveyed the said real estate, with the usual covenants of warranty, to certain trustees, for the benefit of his wife and children; that in January, 1880, the said trustees, being duly authorized so to do, sold and conveyed the said real estate to the appellant, who bought in entire ignorance of the agreement above mentioned between the Melton brothers; that in April, 1881, the said appellant sold and conveyed the said real estate to James C. Hardin, with the usual covenants of warranty; that on the 13th of July, 1886, the Wright judgment, which had not been paid by George W. Melton in his lifetime, or by any one since his death, was levied upon the real estate in the possession of James C. Hardin, and the appellant, in exoneration of his covenant of warranty, having no defense to an action thereon, paid up the Wright judgment; wherefore the appellant claims that by the payment of said judgment he became the assignee

of the covenant of warranty in the deed of George W. Melton to the said trustees; and that having been compelled to pay the Wright judgment, which George W. Melton had undertaken to pay by his agreement of the 25th of November, 1871, the appellant stands as a surety to George W. Melton's estate, "and is entitled to set up said judgment in equity in his own favor in the marshaling of the assets of the estate of the intestate." Again, appellant claims that by the payment of the Wright judgment, he in effect paid the balance of the purchase-money due by George W. Melton for the said real estate over which C. D. Melton held a mortgage, and appellant "is entitled to have the benefit of said mortgage as against the estate of George W. Melton, and to have leave to set it up as a mortgage debt against his estate, and to be subrogated to all the rights of the estate of C. D. Melton in said mortgage."

To this petition the creditors of George W. Melton, who have heretofore established their claims, filed an answer, admitting all of the allegations of the petition, except the following, which they deny: That appellant has become a creditor of the estate of George W. Melton; that appellant bought the real estate "in entire ignorance of the agreement" set forth in the petition; that petitioner had no defense to an action on the covenant of warranty contained in his deed to James C. Hardin; and that appellant, by the payment of the Wright judgment, became an assignee of the covenant of warranty in the deed from George W. Melton to the trustees. They also plead the statute of limitations.

It is conceded that the deed from George W. Melton to the trustees was a voluntary deed, based upon the consideration of natural love and affection only; and we presume that the deed from the trustees to the appellant contained no warranty. The testimony adduced on the part of the appellant was that of Major Hamilton, who stated that he was the attorney of George W. Melton, and as such drew the deed to the trustees, as well as the proceedings under which the trustees obtained leave to sell, and conducted the sale made by them to appellant, and that at that time the Wright judgment was supposed by all parties to be no judgment and no lien upon the property sold, and that the agreement between the Melton brothers, of the 25th of November, 1871, was not known to witness or any one engaged in the case until it was produced in evidence by W. A. Clark in 1884. G. W. S. Hart, Esq., a witness examined for respondents, testified that he with his partner were the

attorneys of Mrs. Wright, and they first learned that George W. Melton had assumed the payment of the Wright judgment some time in the latter part of 1881 or early part of 1882, — prior to July, 1882; but the appellant, it is admitted, had no personal knowledge of such assumption at the time he purchased. It appears from the statements made in the case that C. D. Melton died in December, 1875, and George W. Melton in July, 1876, both being insolvent.

The case was heard by his honor Judge Wallace, who rendered judgment dismissing the petition, and from his judgment the petitioner appeals upon the several grounds set out in the record. Inasmuch as the decree of the circuit judge, together with appellant's exceptions thereto, should be incorporated in the report of the case, it is unnecessary for us to state them particularly here.

The fundamental inquiry in the case is, whether the appellant has any such claim against the estate of George W. Melton as entitled him to the aid of the court in enforcing it. Whatever claim he may have is unquestionably based upon the fact that he has paid the Wright judgment, the payment of which was assumed by George W. Melton by the agreement of 25th of November, 1871; but as such payment was not made for the purpose of relieving the estate of C. D. Melton, but solely for the purpose of relieving the property from the lien of said judgment, which the appellant had bought with notice of the judgment and conveyed with warranty to another, in order to perform his covenant warranty, it is difficult for us to understand what equity he has to be subrogated to the rights which the holder of that judgment, or to the rights which C. D. Melton's estate, may have had against the estate of George W. Melton. There was no privity whatsoever between the appellant and C. D. Melton. He was not a surety of C. D. Melton, and in no way bound to pay said judgment for him. Indeed, practically, he paid no debt for which the estate of C. D. Melton was in equity and good conscience liable; for though such estate was legally liable to pay such judgment, yet in equity and good conscience it was really payable out of the property which the appellant saw fit to buy, with notice that it was subject to such lien. But in addition to this, as the circuit judge well says, the judgment was against C. D. Melton, and not against George W. Melton, who was never liable to pay the amount thereof as a judgment, but only liable by reason of his agreement of the 25th of November, 1871, which



was a mere simple contract obligation, and hence we do not see how it is possible, under any view of the case, for the Wright judgment to be set up as a judgment against the estate of George W. Melton.

As to appellant's claim to set up the mortgage originally given by George W. Melton to C. D. Melton to secure the payment of the purchase-money of the Chester property, the same remark as that just made in reference to the Wright judgment may be made. That mortgage never was a lien on anything but the Chester property, and did not cover any other portion of the property belonging to the estate of George W. Melton, and hence it could not be proved as a mortgage debt against the estate of George W. Melton, under the principle decided in *McLure v. Melton*, 24 S. C. 559; 58 Am. Rep. 272; but if set up at all, it must take the same rank as the debt which it was given to secure, to wit, that of a sealed note. It is necessary, therefore, to inquire whether the appellant can set up the sealed notes as a claim of that rank against the estate of George W. Melton. These notes were extinguished by the arrangement between the Melton brothers of the 25th of November, 1871, when they were canceled and surrendered to George W. Melton, and they cannot now constitute any legal cause of action against the estate of George W. Melton, and whatever equities C. D. Melton or his estate may have had, as intimated in the case of *Hardin v. Clark*, 32 S. C. 485, 486, the appellant has no connection with, so far as we can see.

He cannot claim as assignee of the covenant of warranty contained in the deed from C. D. Melton to George W. Melton, as was held in the case just cited, and we do not see what claim he could have against the estate of George W. Melton as assignee of the covenant of warranty contained in the deed from George W. Melton to the trustees; for that being a voluntary deed, and the measure of damages for breach of a covenant of warranty being fixed by statute at the amount of the purchase-money paid, with interest from the time of the alienation, where there was nothing paid, nothing could have been recovered. If the trustees had been evicted, they certainly could have recovered nothing from the estate of George W. Melton for the breach of the covenant of warranty contained in the voluntary deed under which they held; and the appellant, as their assignee, could have no higher rights than his assignors.

If, therefore, the appellant has any claim at all upon the

estate of George W. Melton, it must arise from the agreement of the 25th of November, 1871, whereby George W. Melton assumed the payment of the Wright judgment. But how can the appellant connect himself with that agreement? That was made for the benefit of C. D. Melton, and possibly might have inured to the benefit of the holder of the Wright judgment, but appellant is neither the assignee of C. D. Melton nor of the holder of the Wright judgment. It seems to us that the true position of the appellant is that of a purchaser of real estate under a quitclaim deed, without warranty, upon which there rested the lien of a judgment, of which he had not only constructive notice unquestionably, arising from the record, which would have been sufficient, but also, as it would seem, actual notice (if we are at liberty to refer to the decision in *Hardin v. Clark*, 32 S. C. 485, offered in evidence in this case), at the time he purchased, and has seen fit to remove such lien by payment in order to protect himself against an action for breach of his covenant of warranty in his deed to his vendee. If this be so, then it is plain that he has no cause of action against the estate of George W. Melton; for if so, then in every case where a person who sells real estate covered by a judgment or other lien, of which his vendee has notice, and conveys the same without warranty, the vendor would be liable for any amount which the vendee might be called upon to pay for the purpose of removing such lien; and this could hardly be pretended, as it would destroy all distinctions between a quitclaim deed and a warranty deed. The fact that the vendor may have assumed the payment of such lien by a contract with a third person, with whom the vendee has not been able to connect himself, cannot alter the case, as such third person might at any time he saw fit release the vendor from the performance of such contract. But even if appellant could connect himself with the agreement of the 25th of November, 1871, that would create a simple contract obligation, which could not be enforced by action after the lapse of six years, — not four, as contended by one of the counsel for respondents, as the change in the statutory period was effected by the code which was adopted the 1st of March, 1870, and not by the Revised Statutes of 1872. So that it is clear that C. D. Melton or his administrator would have been barred of their action on such promise long before the petition in this case was filed, unless protected by the order of injunction, and the appellant, who

certainly could not claim any higher rights, would be in like condition.

We must consider, then, the effect of the order of injunction which was granted before the expiration of the six years. It will be observed that this order only restrained creditors from prosecuting their actions at law, and did not prevent them from coming in and proving their demands in the case in which the order of injunction was granted. On the contrary, they were called upon to do so by a time fixed for that purpose,—the 15th of January, 1878. But the appellant not only failed to come in within six years from that date and present his demand, but he failed to do so within six years from the filing of the report on claims,—the 1st of February, 1884. So that even if appellant ever had any claim against the estate of George W. Melton, growing out of his promise to C. D. Melton to pay the Wright judgment, it was barred by the statute before he filed his petition or presented his claim, which, according to what was held in *Warren v. Raymond*, 17 S. C. 203, 204, must be regarded as the time when he commenced his action. The fact that the appellant filed his petition, commenced his action, within six years after he paid the judgment cannot affect the question; for without considering the question whether he could have brought his action before making such payment, it is sufficient to say that he can claim no higher rights than C. D. Melton, and certainly he and his administrator were barred long before the appellant instituted this proceeding.

The judgment of this court is, that the judgment of the circuit court be affirmed.

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**SUBROGATION, DOCTRINE OF.** — To justify the application of the doctrine of subrogation, one must have paid a debt due to a third person, for the payment of which another was primarily liable, and the person paying the debt must, in doing so, have acted under the compulsion of saving himself from loss, and not as a mere volunteer: *Regan v. New York etc. R. R. Co.*, 60 Conn. 124; 25 Am. St. Rep. 306, and note; *Carpenter v. Minter*, 72 Tex. 370; *New Orleans Nat. Bank v. Eagle Cotton etc. Co.*, 43 La. Ann. 814. In *Birdsall v. Cropsey*, 29 Neb. 679, where realty was purchased by two persons as co-tenants, one of whom afterwards sold his interest to the other, the vendee agreeing to pay the balance of the original purchase price, and such vendee subsequently conveyed to another party under a similar agreement, it was decided that the last vendee, by discharging the balance of such purchase-money, was not entitled to be subrogated to the lien of the first vendor so as to prevent a lien from attaching in favor of the tenant who conveyed to his co-tenant. In New York it has been decided that the right of subrogation is

founded upon equitable grounds, and capable of being asserted by one who has no absolute interest in the property, but who may become the owner thereof and pays the debt to save himself from a loss: *Pease v. Egan*, 131 N. Y. 262.

**COVENANT OF WARRANTY — DAMAGES FOR BREACH.** — As to what damages may be recovered by a remote vendee for a breach of a covenant of warranty of title, see *Brooks v. Black*, 68 Miss. 161, 24 Am. St. Rep. 259, and note 268, in which the South Carolina rule is mentioned.

**LIMITATIONS OF ACTIONS.** — The general rule is, that when the statute of limitations has once commenced to run, no subsequent disability can check or impede it: *Doyle v. Wade*, 23 Fla. 90; 11 Am. St. Rep. 334, and note; unless such subsequent disability grows out of some positive statutory enactment: Note to *Moore v. Armstrong*, 36 Am. Dec. 78; note to *Miller v. Surla*, 65 Am. Dec. 601, 602. Neither the suspension of the powers of an administrator, nor proceedings to contest the validity of a will, will suspend the running of the statute: *Dorland v. Hanson*, 81 Cal. 202; 15 Am. St. Rep. 44, and note; note to *Miller v. Surla*, 65 Am. Dec. 602. In *Buell v. Buell*, 92 Cal. 393, it was decided that a writ of injunction restraining a judgment creditor from issuing an execution did not suspend the running of the statute limiting the issuance of an execution to a period of five years after the entry of the judgment.

## CROCKER v. ALLEN.

[34 SOUTH CAROLINA, 482.]

**JUDGMENT RENDERED WITHOUT SERVICE OF PROCESS, NOW RELIEVED AGAINST.** — The proper mode by which to obtain relief against a judgment rendered against a party without service of process is by motion in the original cause, and a complaint in equity which alleges that a judgment of foreclosure was rendered against the plaintiff in a suit in which he was never served with process, and prays for an injunction against such judgment, but which does not state any grounds of equitable cognizance, fails to state a cause of action.

**EQUITY WILL NOT RELIEVE AGAINST JUDGMENT NOT SHOWN TO BE UNJUST.** — A court of equity will not relieve a party from a judgment obtained against him for a debt which is neither alleged nor shown to be unjust.

**ACTION to set aside a judgment and to obtain an injunction.**  
The complaint is as follows:—

“1. That heretofore, on the — day of February, 1888, the defendant herein attempted to institute an action against her and a co-defendant, J. J. Lipscomb, by the service upon him, and an attempted service upon her, of a summons and complaint therein, which complaint alleged:—

“1. That on the 9th of March, 1886, they, the said defendants, executed to her their joint and several note, wherein they promised to pay her, twelve months after date, the sum

of seven hundred dollars, with interest from date at ten per cent per annum until paid, payable semi-annually, and if not paid, to bear same rate as principal, and also to pay all costs and expenses, including ten per cent attorney's commissions.

"2. That the said defendant, R. F. Crockett, to secure the payment of the said note, executed to her on the same day a mortgage upon two tracts of land in said county, known as lots Nos. 5 and 6 of the estate of Gullie Crocker, deceased. Lot No. 5 being bounded by lands of Madison Lee, C. B. Hammett, Eliza Lee, and others; and No. 6 being bounded by lands of J. W. Wilkins, Mrs. E. M. Wilkins, Mrs. E. M. Lipecomb, and others,—containing together 245 acres, more or less, and that the mortgage was duly recorded in book 8, p. 140.

"3. That the condition of the note and mortgage had been broken, and that there was due thereon the sum of seven hundred dollars, with interest from the 9th of September, 1887, and the further sum of seventy dollars attorney's commissions,

"Judgment was asked for foreclosure of mortgage and execution for balance of debt remaining due after exhausting mortgaged lands.

"4. That on the third day of April, 1888, a decree was rendered in said action by his honor Judge W. H. Wallace, wherein he ordered that the said mortgaged premises, or so much thereof as should be necessary, be sold at public auction at Spartanburg C. H., by the sheriff, on salesday in October, or some convenient salesday thereafter, on terms of one half cash and balance on credit of six months; and provided for the application of the proceeds of such sale in accordance with the allegation and prayer of the complaint, and rendering judgment against both defendants for any balance that might be found due, after exhausting the proceeds of such sale; also ordering that the said R. F. Crocker, and all persons claiming under her, be forever barred and foreclosed of all right, title, interest, and equity of redemption in the said premises so sold.

"5. That the said decree was, on the fourth day of April, 1888, duly filed with the clerk of court of said county, and on the 12th of same month the costs in said action were by him duly taxed and approved, and along with the decree entered and signed in judgment and recorded; all of which will more fully appear by reference to the judgment roll in said action, No. 9,162.

"6. That the said decree was rendered by default, notwith-

standing it appears from said judgment roll that there was no affidavit of plaintiff or her attorney that no answer, demurrer, or notice of appearance had been served or received therein.

"7. That plaintiff has never at any time been served with a summons or complaint in said action, and that the first information she had of her having been sued therein was the advertisement of her aforesaid land for sale under said decree.

"8. That in accordance with the terms of said decree, the sheriff has advertised the said premises for sale on salesday of November next, and that they will be sold unless prevented by this court.

"9. That the said decree, and all proceedings thereunder, are null and void as to this plaintiff.

"Wherefore plaintiff asks judgment: 1. That the sheriff of said county, the defendant, her agents or servants, be restrained from advertising and selling said land, and from otherwise attempting to enforce said decree as against plaintiff; 2. That said decree be set aside and vacated as to her; 3. For the costs of this action, and for such other relief as may be just."

The complaint was dismissed with costs, and the plaintiff appealed.

*Stanyarne Wilson*, for the appellant.

*Bemar and Simpson*, contra.

McIVER, J. This was an action brought by the plaintiff herein to set aside a judgment previously obtained against her by the defendant herein, and to obtain an injunction to restrain the enforcement of the execution issued on said judgment, solely upon the ground that she was never served with the summons in the former action, and had no knowledge of any such proceedings against her until her land was advertised for sale under said execution. In her complaint, a copy of which it is set out in the "case," and which should be incorporated in the report of this case, she makes no allegation of fraud, and states no fact imparting an equitable feature to her case, and her demand for an injunction is not sufficient to give it such a character, for two reasons: 1. Because, as we have held in the case of *Westlake v. Farrow*, 34 S. C. 270, decided at the present term, the demand for relief cannot be looked to as giving character to the cause of action; and 2. Because she states no case entitling her to an injunction: *Gillam v. Arnold*, 32 S. C. 503.

The circuit judge held, amongst other things, which under the view we take of the case need not be stated, that the complaint failed to state facts sufficient to constitute a cause of action, and therefore rendered judgment dismissing the complaint. From this judgment plaintiff appeals upon the several grounds set out in the record; but as the fundamental question in the case, superseding all others, is whether the circuit judge erred in his ruling as above stated, we shall confine ourselves to that question.

In the case of *Southern Porcelain Mfg. Co. v. Thew*, 5 S. C. 5, the action was brought to set aside a judgment confessed by the president of the plaintiff company to the defendant, upon the allegation that the judgment was null and void for three reasons, substantially: 1. Because the confession, not being under the corporate seal, was not legal or binding upon the plaintiff; 2. Because the debt admitted by the plaintiff was not the legal obligation of the plaintiff corporation; 3. That the confession was signed by a person having no authority whatever to do so. It was held that these averments, standing by themselves, would neither support an action at law nor a bill in equity under the former procedure; but that the remedy was by motion in the court in which the judgment was rendered, if the same was insufficient in form, or for any reason void. In that case it is said: "An action under the Code of Procedure only lies where the subject-matter of such action furnished ground, previous to the adoption of the code, for the maintenance of either an action at law or a bill in equity," or in certain other cases not applicable to the present inquiry. "What rights shall be enforced, and what wrongs shall be redressed by a civil action, is not determined by the code, except in the case of proceedings formally taken by *scire facias*, *quo warranto*," etc. "These matters are therefore to be determined according to the law as it stood previous to the adoption of the code. In order, then, to ascertain whether a complaint under the code sets forth a sufficient cause of action, except in the special cases above enumerated, the inquiry must be, whether, under the former practice of this state, the matters set forth were sufficient either to support an action at law or a bill in equity."

Now, as it was well settled that a court of equity would not entertain a case asking for relief, where the party complaining had a plain, adequate, and complete remedy at law, the practical inquiry in this case is, whether, under the former



practice, the plaintiff would have had a plain and adequate remedy for the wrong of which she complains, by motion to the court and in the case in which the judgment in question was rendered. If she had, then she cannot maintain an action on the equity side of the court to obtain the redress sought, but must resort to the simpler and less expensive remedy by motion.

A review of the authorities will show beyond dispute that the court of common pleas has always claimed and exercised the power to entertain such a motion. In *Mooney v. Welsh*, 1 Mill Const. 133, the motion was to set aside a judgment on the ground that the verdict and judgment exceeded the damages laid in the writ; and it was held that the court of common pleas has always exercised the power of looking into its own records, and on motion affording that remedy which is obtained by writ of error in England. In *Barns v. Branch*, 8 McCord, 19, a motion was entertained to set aside proceedings for partition in the law court, upon the ground of want of notice to the guardian *ad litem* of the infant defendants, although such want of notice did not appear on the record. In that case Nott, J., expresses the opinion that a court of equity could not afford relief. In *Wotton v. Parsons*, 4 McCord, 368, the motion was to set aside a judgment upon the same ground as that upon which the plaintiff in the case now under consideration bases her action, to wit, want of service of the process; and it was held that while a judge at chambers could not grant such a motion, yet he might order a stay of execution until the motion could be heard and determined by the court.

In *Possey v. Underwood*, 1 Hill, 263, O'Neill, J., uses this language: "Generally there can be no doubt that a court of law possesses exclusive jurisdiction over the amendment or vacation of its own judgments. This power applies most usually to matters of form or substance apparent on the face of the record. Sometimes, however, it is exercised, as between the parties, on matters out of and beyond the record; and he goes on to prescribe the mode of proceeding in such cases." To the same effect is *Dial v. Farrow*, 1 McMull. 292, 36 Am. Dec. 267, in which Judge O'Neill in terms recognizes the doctrine that a judgment may be set aside on a motion upon the ground that defendant had not been served with process. In *Haigler v. Way*, 2 Rich. 324, it was held that the proper mode of proceeding to set aside a judgment irregularly obtained against an infant, there having been no guardian *ad litem* appointed,

and no appearance having been entered, was by a motion in the case.

In *Williams v. Lanneau*, 4 Strob. 27, a judgment for the amount assessed in lieu of dower was set aside on motion, upon the ground that the defendant had not been served with a copy of the summons on which the subsequent proceedings were based, the court recognizing several of the preceding cases, especially *Wotton v. Parsons*, 4 McCord, 368, and citing another very similar case, *O'Neill v. Wright*, which does not seem to have been reported. To same effect, see *Crane v. Martin*, 4 Rich. 251, *Mills v. Dickson*, 6 Rich. 487, and *Stenhouse v. Bonum*, 12 Rich. 620, in which last-named case the judgment was set aside on motion upon the ground of want of jurisdiction in the court which undertook to render said judgment. The case of *Townsend v. Meetze*, 4 Rich. 510, is not in conflict with the foregoing cases. On the contrary, the practice of proceeding by motion was distinctly recognized, and the only reason why the motion was refused in that case was because a discovery was demanded and was necessary, which could only have been obtained in a court of equity.

These cases unquestionably establish the doctrine that the proper mode of proceeding to set aside a judgment, prior to the abolition of the court of equity, was by motion to the court and in the cause wherein the judgment was rendered, and therefore a bill in equity for that purpose would not be entertained by the court of equity, unless it contained allegations imputing to the case some features of equitable cognizance, such, for example, as fraud, accident, or mistake, or unless a discovery was demanded: See *Attorney-general v. Baker*, 9 Rich. Eq. 530, 531; *McDowall v. McDowall*, Bail. Eq. 325. That the same practice has been recognized and followed since the court of equity was abolished as a separate tribunal may be seen by reference to the cases of *Southern Porcelain Mfg. Co. v. Thew*, 5 S. C. 5; *Clark v. Porcelain Mfg. Co.*, 8 S. C. 22; *Ex parte Carroll*, 17 S. C. 446; *Ferguson v. Gilbert*, 17 S. C. 26; *Darby v. Shannon*, 19 S. C. 533; *Turner v. Malone*, 24 S. C. 398.

To these authorities in our own state may be added that of the supreme court of the United States in the case of *Walker v. Robbins*, 14 How. 584. In that case a bill in equity was filed in the circuit court of the United States for the district of Mississippi, praying a perpetual injunction against a judgment recovered in an action at law in the same court, upon the ground, amongst others, that Walker had not been served

with process in the action at law, though the record of such judgment showed on its face that Walker had been duly served. It was held that the bill could not be maintained, the court using this language: "Assuming the fact to be that Walker was not served with process (that being the undisputed evidence in the case), and that the marshal's return is false, can the bill in this event be maintained? The respondents did no act that can connect them with the false return; it was the sole act of the marshal, through his deputy, for which he was responsible to the complainant Walker for any damages that were sustained by him in consequence of the false return. This is free from controversy; still the marshal's responsibility does not settle the question made by the bill, which is, in general terms, whether a court of equity has jurisdiction to regulate proceedings, and to afford relief at law where there has been abuse in the various details arising on execution of process, original, mesne, or final. If a court of chancery can be called on to correct one abuse, so it may be to correct another, and in effect to vacate judgments where the tribunal rendering the same would refuse relief, either on motion or on a proceeding by *audita querela*, where this mode of redress is in use. In cases of false returns affecting the defendant, where the plaintiff at law is not in fault, redress can only be had in the court of law where the record was made; and if relief cannot be had there, the party injured must seek his remedy against the marshal." It is true that in that case the court does go on to assign another reason for conclusion reached, — that the appellant, Walker, though not served with process, had really appeared by counsel in the action at law, — but this does not weaken the force and effect of the first reason assigned in the words above quoted.

It seems to us clear, therefore, that this action on the equity side of the court cannot be sustained, where, as in this case, the complaint contains no allegations imputing to the case any features of equitable cognizance, but rests solely upon the allegation that plaintiff was never served with process in the action in which the judgment in question was recovered. The fact that such judgment was recovered in an action on the equity side of the court to foreclose a mortgage cannot affect the question. The record of the case in which the judgment sought to be set aside is complete in itself, and shows no flaw or defect. It does not show that the defendant therein (the plaintiff here) was not served, but shows the contrary; and if

It is proposed to show that the return of the sheriff was false, by evidence *de hors* the record, it should be done by a motion in that case; for while it stands as it is, it must be regarded as a valid judgment in any other action or proceeding. In this respect the present case differs radically from *Finley v. Robertson*, 17 S. C. 439, and *Genobles v. West*, 23 S. C. 160; for there the jurisdictional defect, for want of proper service, appeared upon the face of the record, while here the contrary is the case.

It cannot be said that the necessity for an injunction would be sufficient to give the court of equity jurisdiction; for that relief was always obtainable by a motion to stay the execution, which the authorities above cited show could have been granted by a circuit judge at chambers, even before the enactment of the statute expressly conferring such power, now incorporated in General Statutes as section 2115.

There is another view which would be sufficient to show that this action on the equity side of the court cannot be maintained under the allegations made in the complaint. In *Freeman on Judgments*, section 498, the author, while admitting that there are decisions in some of the states to the contrary, says: "The better established rule undoubtedly is, that notwithstanding an alleged want of service of process, a court of equity will not interfere to set aside a judgment until it appears that the 'result will be other or different from that already reached.'" This, we suppose, rests upon the elementary doctrine that he who seeks equity must do equity. Where, therefore, a party invokes the aid of the court of equity to be relieved from a judgment obtained against him for a debt which is neither alleged nor shown to be unjust, simply on the ground of some error in the proceedings not affecting the merits, the court of equity may very properly refuse its aid in enabling a party to escape the payment of what appears to be a just debt, and which is neither alleged nor shown to be otherwise, and leave the party to his remedy at law, if he has any. As is said by Curtis, J., in *Hendrickson v. Hinckley*, 17 How. 443: "A court of equity does not interfere with judgments at law unless the complainant has an equitable defense of which he could not avail himself at law, because it did not amount to a legal defense; or had a good defense at law which he was prevented from availing himself of by fraud or accident, unmixed with negligence of himself or his agents"; citing *Walker v. Robbins*, 14 How. 584, and also *Marine Insurance Co. v. Hodgson*, 7 Cranch, 833, in which that great judge, Marshall, C. J., said:

“Without attempting to draw any precise line to which courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may safely be said that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery.”

It seems to us, therefore, that in no view of the case could the action be maintained, and that there was no error in dismissing the complaint.

The judgment of this court is, that the judgment of the circuit court be affirmed.

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**JUDGMENT — RELIEF FROM, IN EQUITY.** — Relief from a judgment will not be granted by a court of equity, where the party complaining has a remedy at law, or might make a motion for a new trial at the term at which the judgment was rendered: *Hamblin v. Knight*, 81 Tex. 351; 26 Am. St. Rep. 818, and note; note to *Morrill v. Morrill*, 23 Am. St. Rep. 117. A court of equity has no jurisdiction to enjoin a judgment entered in a court of law merely because process was not served upon the defendant: *Burch v. West*, 134 Ill. 258. In such a case the judgment debtor may move to set aside the judgment in a court of law: *Hier v. Kaufman*, 134 Ill. 215. Equity may, however, restrain the collection of a judgment rendered by a justice's court without jurisdiction: *Dady v. Brown*, 76 Iowa, 528.

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## GRANTHAM v. GRANTHAM.

[34 SOUTH CAROLINA, 504.]

**WIFE'S EARNINGS — GIFT OF, BY HUSBAND INFERRED WHEN — RESULTING TRUST.** — Where a husband, free from debt, allows the earnings of his wife to accumulate in the hands of her employer, and he never claims such earnings as his own, an executed gift thereof from him to her will be inferred, and if he subsequently purchases therewith a lot of land, taking the title thereto in his own name, a resulting trust will arise in her favor.

**ACTION for partition.** The opinion states the case.

*Blanding and Wilson*, for the appellants.

*Haynesworth and Cooper*, contra.

**McIVER, J.** James Grantham, the elder, died some time in 1881, intestate, seised and possessed of some real estate, leaving

as his heirs at law his widow, the plaintiff herein, and two children, James Grantham, one of the defendants herein, and Julia Ann Diggs, who died in 1887, leaving eleven children, who are the other defendants herein, and this action was commenced in May, 1890, for the partition of said real estate.

The only question presented by this appeal is as to whether a certain lot in the city of Sumter, described in the complaint, constituted a part of the real estate of the said intestate, the plaintiff claiming that it belongs to her individually, and the defendants claiming that it constituted part of the real estate of intestate, and as such is subject to partition amongst his heirs at law. The facts seem to be undisputed, and are substantially as follows: The intestate, James Grantham, and his wife, Elizabeth, were both in the employment of the late Judge Moses, and while the intestate was in the habit of drawing his own wages, those of his wife were allowed to remain in the hands of the Judge. On the third of May, 1878, Martha E. McCoy executed a conveyance of the lot in question to the intestate, wherein it was recited that it was in consideration of the sum of forty-five dollars paid by him to her, but the plaintiff claims that this money was hers, and therefore contends that there is a resulting trust in her favor in the said lot. The testimony leaves but little, if any, doubt that the lot was paid for with the wages of the wife, which had been allowed to accumulate in the hands of Judge Moses, and drawn from him by the intestate for the purpose of paying for the lot, and but for the marital relation existing between the parties, these facts would be sufficient to raise a resulting trust in favor of the plaintiff.

It is contended, however, that under the law as it then stood, the earnings of the wife belonged to the husband, and therefore, though the money used in paying for the lot was derived from the wages of the wife, it was in law the money of the husband, and hence there was no resulting trust. While it is quite true, that as the law then stood, the earnings of a married woman, derived from her personal services, belonged exclusively to the husband, yet there was nothing to prevent the husband from making a gift to his wife of her earnings, provided this was done without detriment to the claims of the husband's creditors, of whom there does not appear to be any in this case. So that the real inquiry in this case is, whether the intestate had given his wife's wages to her, and whether, when he drew them, he was not acting simply as her agent. This is a question of fact which has been determined adversely

to the appellants by the circuit judge, and we think his conclusion is most abundantly sustained by the testimony set out in the case. From that it appears that the wife's wages were allowed to accumulate in the hands of her employer for the express purpose of providing a fund for the purchase of a home for her. The intestate, both before and after the purchase, always spoke of the money as his wife's, and never, upon any occasion, spoke of it or claimed it as his own, and it could not have been hers except by a gift from her husband, and hence the inference that he had given it to her is irresistible.

As the counsel for respondent well puts it, suppose he had drawn his wife's wages every month and deposited the money in bank to her credit, what higher evidence could be needed of a gift from him to her? And when, instead of doing this, he left her wages from month to month in the hands of Judge Moses, declaring his purpose in doing so, he practically deposited his wife's monthly wages from time to time with the Judge for her benefit, instead of drawing them every month for his own use, as he might have done, and he thereby just as unmistakably made a gift to his wife as if he had drawn the money and deposited it in bank to her credit. The fact that when the purchase was made the title was taken in the name of the husband is not sufficient to overcome the undisputed evidence of his declarations, made both before and after the purchase, that the property was paid for with his wife's money; for, in the first place, that might have arisen from ignorance or some other cause; and in the second place, if he had already given the money to his wife, he could not afterwards recall the gift without her consent, of which there is not the slightest evidence. We do not think, therefore, that there was any error on the part of the circuit judge in concluding that the property was paid for with the money of the wife, and hence a resulting trust arose in her favor.

The judgment of this court is, that the judgment of the circuit court be affirmed.

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**HUSBAND AND WIFE — PURCHASE BY HUSBAND WITH WIFE'S MONEY.** — A resulting trust in favor of the wife is created where a husband agrees to treat the wife's money as her separate estate, and invests it in land for her benefit, taking the title in his own name: *Beam v. Bridgers*, 108 N. C. 276; 23 Am. St. Rep. 59, and note; *Beane v. Welborn*, 74 Tex. 530; 15 Am. St. Rep. 858, and note; *Light v. Zeller*, 144 Pa. St. 570; *Ross v. Hendrix*, 110 N. C. 493; *Barlow v. Barlow*, 47 Kan. 676.



**WHEELER v. ALDERMAN.**

(IN SOUTH CAROLINA, 582.)

**JUDGMENT SATISFIED ON RECORD, SALE UNDER, ENJOINED WHEN.** — Where money is lent upon land, and a mortgage given to secure its payment, after a satisfaction of a prior judgment against the owner of the land is made upon the face of the record, and a party purchases for value at a sale of the land under the foreclosure of the mortgage, without notice that the entry of the satisfaction was made without authority, after which the judgment creditor, on notice to the judgment debtor only, has such entry of satisfaction vacated, issues execution, makes a levy, and advertises the land for sale thereunder, such purchaser may invoke the aid of a court of equity to enjoin the sale under the judgment, although no collusion between the parties to the judgment is shown.

**AUTHORITY OF ATTORNEY, PARTY ESTOPPED TO DENY, WHEN.** — Where an attorney prepares a confession of judgment voluntarily made to a creditor, signing himself as attorney for plaintiff, advises the filing of the transcript of such judgment, and afterwards satisfies the judgment on the record, signing himself as attorney for the judgment creditor, as to an innocent purchaser for value, who parted with his money in the faith that such satisfaction was valid, the judgment creditor claiming the benefit of the judgment will be estopped from denying that the attorney had authority to act for him. While an attorney has no right, as between the parties, to enter satisfaction of a judgment without the actual receipt of the money due on it, yet where the rights of third persons intervene, a subsequent purchaser for value of the land affected by such judgment will be protected, even though it be afterwards made to appear that the satisfaction was improperly entered.

**ACTION for an injunction.** The opinion states the case.

*T. S. Moorman*, for the appellant.

*J. J. Brown*, contra.

**McIVER, J.** The facts out of which the controversy in this case has arisen are substantially as follows: One Owen Alderman, the brother of the defendant herein, confessed a judgment to him for the sum of upwards of five hundred dollars, which was duly entered in the proper office of Aiken County on the 12th of March, 1885, and a transcript thereof was duly filed in the proper office of Barnwell County, where the land which constitutes the subject-matter of this litigation is located, on the 23d of November, 1885. Upon the back of this transcript the following indorsement, without date, appears:—

“Received of the judgment debtor herein the full amount of the within judgment, with the cost and the interest thereon, which is full satisfaction of the same.”

(Signed)

“H. S. ALDERMAN,  
Per JAS. E. DAVIS, Plaintiff's Att'y.”

On the 28th of December, 1885, the said Owen Alderman executed a mortgage on the land in question to the American Freehold Land Mortgage Company of London, to secure the payment of money then borrowed by him from said company; and upon default in the payment of the same, the said land, on the 5th of December, 1887, was sold under the power contained in the said mortgage, and bought by W. G. Wheeler, the plaintiff herein.

On the 11th of June, 1888, the said H. S. Alderman, the defendant herein, but the plaintiff in said judgment, moved for and obtained from his honor Judge A. P. Aldrich, an order vacating the entry of satisfaction above copied, with leave to issue execution on said judgment. This motion was made without notice to the plaintiff herein, or to any one else, except the said Owen Alderman, and was based upon the affidavit of said H. S. Alderman that the entry was made without his authority or knowledge, and that nothing had in fact been paid on said judgment. Under the execution thus authorized to be issued to enforce said judgment, the sheriff of Barnwell County levied upon the said land, and advertised the same for sale, on salesday in July, 1888, as the land of said Owen Alderman.

Thereupon the plaintiff commenced this action to perpetually enjoin said sale. In his complaint, amongst other appropriate allegations, the plaintiff alleges that he has paid the whole amount of the purchase-money bid at the sale under the mortgage, and that the subsequent proceedings to open the judgment were intended as a fraud upon him, and will operate as such unless he obtains the relief demanded. The defendant answered, denying all fraud and collusion on his part, and denying that the said James E. Davis ever was his attorney, or ever had any authority to receive the money due upon said judgment, or to enter satisfaction thereon.

The testimony adduced on the part of the plaintiff tends to show that the transcript of judgment was entered in Barnwell County, after the negotiations for the loan of the money by the mortgage company had been completed. But before the money was paid over to Owen Alderman, the agent of the company made a final search of the records, which revealed the fact that the transcript of judgment had been entered a short time before, whereupon this fact was brought to the attention of Owen Alderman, who said the judgment had been paid and should so appear upon the record, and the said James

**E. Davis**, one of the attorneys of record in the said judgment informed said agent that the judgment was actually paid and had already been marked satisfied upon the back of the transcript in the clerk's office, and that he would also make the entry of satisfaction upon the abettract of judgments, which he subsequently did, to wit, on the 5th of April, 1886. The testimony on the part of the defendant tended to show that **James E. Davis**, the attorney who took the confession of judgment, and who indorsed the entry of satisfaction on the record thereof, was not the attorney of **H. S. Alderman**, who had never seen or had any communication with him, but acted entirely at the request and under the direction of **Owen Alderman**, who was his brother-in-law, and the defendant in his testimony says that his brother **Owen** owed him five hundred dollars, besides interest, for money loaned him on the 24th of February, 1888, for which a note was then given; that the said **Owen** promised to secure him,—"he confessed judgment in my favor voluntarily to make me secure for my money, and told me he had confessed the judgment for that purpose"; that no part thereof has ever been paid either to defendant or to any one for him within his knowledge; and that he never authorized any one to collect or satisfy said judgment until he employed **Mr. Patterson**, some time in the spring of 1888, to collect the judgment, and that he had never employed **James E. Davis**,—"did not know him, and had never had any business transaction with him."

The issues in the action having been referred to the master, he made his report, finding the facts substantially as we have stated them in the outset of this opinion, and finding, as matter of fact, "that there was no fraud or collusion on the part of **H. S. Alderman**, defendant herein"; he found, as matter of law, that the plaintiff is not entitled to any equitable relief upon the ground of fraud; and "that plaintiff is not entitled to equitable interposition by injunction, on the ground that the judgment has been satisfied." Upon this report, and the exceptions thereto filed by the plaintiff, the case was heard by his honor **Judge Hudson**, who held "that while there may have been no collusion on the part of the **Aldermans**, or corrupt purpose in their transactions, at the same time the loan was made to **Owen Alderman** upon the faith of the statement of the said **Owen Alderman** and **James E. Davis**, who acted as attorney for both parties in obtaining the judgment; and while the satisfaction made and acknowledged by said **James**

H. Davis on the records of the county may be incorrect, its effect was to induce the lender of the money to make the loan, and W. G. Wheeler, the plaintiff, to become the purchaser of the land. To allow a sale under such circumstances would operate as a fraud upon the rights of the party who made the loan, and upon the rights also of the plaintiff, who claims under the lender of the money." He further held that a court of equity "will enjoin a sale under execution, although the purchaser acquires no title, where the effect of such sale is to cloud the title of one who, like this plaintiff, occupies the position of an innocent purchaser for value without notice."

Judgment was accordingly rendered, perpetually enjoining the enforcement of said judgment against the land in question. From this judgment defendant appeals upon the several grounds set out in the record, which impute error to the circuit judge in holding, — 1. That the case made by the plaintiff entitled him to "equitable interference"; 2. That Davis acted as attorney for both parties in obtaining the judgment, and that H. S. Alderman was bound by the statements made by Davis and Owen Alderman; 3. That while the satisfaction entered upon the record of the judgment may be incorrect, yet as it induced plaintiff to become the purchaser of the land, the defendant is thereby estopped by said entry, although said Davis acted without authority and without receiving the money; 4. In perpetually enjoining the enforcement of the execution against the land in question.

The first ground raises the question of the jurisdiction of the court, and therefore lies at the very foundation of the case. That the court of equity has jurisdiction to prevent or remove a cloud upon the title to land in certain cases cannot be questioned: 2 Pomeroy's Eq. Jur., sec. 788; 3 Pomeroy's Eq. Jur., secs. 1898, 1899; High on Injunctions, secs. 269-278. The inquiry, then, is, whether this is one of the cases in which such jurisdiction can be exercised. It will be observed that the plaintiff in this case bases his claim for protection upon the ground that he is an innocent purchaser for valuable consideration without notice, which is peculiarly an equity doctrine: 2 Pomeroy's Eq. Jur., sec. 788; and also charges fraud and collusion between the creditor against whose judgment he is seeking protection and his judgment debtor. It is therefore clearly distinguishable from the cases of *Green v. Bank of Georgia*, 10 Rich. Eq. 27, *Brown v. Dickinson*, 10 Rich. Eq. 408, *Wilson v. Hyatt*, 4 S. C. 369, and *Gillam v. Arnold*, 32 S. C. 503, relied

upon by appellant. The plaintiff here does not rely upon a mere legal right, which he does not need the aid of a court of equity to enforce, as in the cases just mentioned; but his reliance here is upon a pure equity, which does require the aid of a court of equity to enforce. The present case is more analogous, though not strictly so, to the case of *Martin v. Martin*, 24 S. C. 446, where a purchaser of land, with covenant of warranty, was allowed to invoke the aid of equity to protect himself from a prior mortgage held by his grantor. The fact that the master has found that there was no fraud or collusion on the part of H. S. Alderman, which finding has not been disturbed by the circuit judge, is not conclusive; for though there was no actual fraud upon the part of H. S. Alderman, yet as the circuit judge well says, it would certainly operate as a fraud upon the plaintiff, whether so intended or not, to allow a sale of the land under a judgment which, at the time of plaintiff's purchase, bore upon the face of the record evidence that it was satisfied, even though it should afterwards be made to appear that the entry of satisfaction was without authority.

The second ground of appeal incorrectly represents the circuit judge as holding that the defendant herein "was bound by the statements made by Mr. James E. Davis and Owen Alderman, the judgment debtor." We do not understand the decree of the circuit judge as being based upon any "statements" made either by Davis or the judgment debtor, but upon the fact that Davis, who acted as the attorney for both parties in obtaining the judgment, had acknowledged satisfaction on the record. That Davis acted as the attorney for both parties cannot well be disputed in the face of the uncontradicted testimony that he prepared the papers, and indorsed the name of his firm thereon as attorneys for the plaintiff in said judgment, and advised the filing of the transcript of the judgment; and what is much more significant, signed the name of H. S. Alderman to the entry of satisfaction, "per Jas. E. Davis, plaintiff's att'y"; and the real question is that which the third ground of appeal was doubtless intended to raise,—whether he had any authority so to act for H. S. Alderman.

While it is quite true that there is no direct evidence that Davis was ever employed as an attorney by H. S. Alderman, yet the fact of his having so acted, and that H. S. Alderman is now claiming the benefit of his act, together with other

circumstances presently to be alluded to, is sufficient in our judgment to establish that relation between Davis and H. S. Alderman. If the confession of judgment had never been taken, or if, after it was taken in the county of Aiken, the transcript thereof had never been filed in Barnwell County, it is very obvious that H. S. Alderman would have had no pretense of a lien upon the plaintiff's land, and hence if he has any such lien, he must claim it through the judgment which was prepared by Davis, acting as his attorney; and he cannot now claim the benefit, without assuming the corresponding burden, at least so far as the rights of subsequent innocent purchasers are concerned. As is said in 1 Parsons on Contracts, \*51: "An adoption of the agency in part adopts it in the whole, because a principal is not permitted to accept and confirm so much of a contract made by one purporting to be his agent as he shall think beneficial to himself, and reject the remainder." Upon this principle H. S. Alderman cannot be permitted to claim the benefit of the act done by Davis as his attorney, and at the same time repudiate his attorneyship.

In addition to this, it appears from the defendant's own testimony that when the money was loaned for which the judgment was taken, it was on the promise of the borrower to secure or make safe the lender, and that the judgment was voluntarily confessed by Owen Alderman to H. S. Alderman for that purpose, and H. S. Alderman was told by Owen that he had confessed the judgment in accordance with his promise. It would seem, therefore, that H. S. Alderman, when he loaned the money to his brother Owen, relied upon him to secure the same, and when Owen employed Davis to take the confession for the purpose of carrying out his promise, he was really acting for the benefit of H. S. Alderman, who cannot now be permitted to avail himself of such benefit, and at the same time repudiate the agency through which it was secured. It seems to us, therefore, that Davis must be regarded as the attorney of H. S. Alderman in taking the confession of judgment. If so, then he had authority to receive the money due thereon and enter satisfaction on the judgment: *Pool v. Gist*, 4 McCord, 259; *Treasurer v. McDowell*, 1 Hill, 184; 26 Am. Dec. 166; *State ex rel. Taylor v. Easterling*, 1 Rich. 810.

It is very true that an attorney has no authority to enter satisfaction without the actual receipt of the money, and as between the parties, such an entry of satisfaction, without the

actual receipt of the money, may be vacated upon a showing to that effect. But where the rights of third persons intervene, the question of estoppel comes in, as it would operate a fraud upon an innocent purchaser without notice to allow a judgment, which, when he purchased, bore upon its face the evidence that it was satisfied, to be opened and used as a lien upon the property purchased, even though it should be afterwards made to appear that the satisfaction was improperly entered: See *City Council of Charleston v. Ryan*, 22 S. C. 339; 58 Am. Rep. 718. In the present case it appears that when the money was loaned upon the mortgage under which the land was sold, and when the plaintiff purchased, the judgment which is now sought to be set up as a lien on the land bore upon its face not only an entry of satisfaction, but also a declaration of the receipt of the money due, so that the records, which purchasers are invited and expected to examine before purchasing, showed that there was no lien upon the land, and it would be a palpable fraud upon the plaintiff herein to allow the judgment to be set up as a lien upon the land, because it has been subsequently made to appear that no money was in fact received, and the entry of satisfaction was made without authority. Any other view would shake confidence in the public records, and jeopardize many titles acquired upon the faith of what such records show, and cannot for a moment be entertained.

The fourth ground is too general in its character to call for further notice than what it has incidentally received in considering the other grounds.

The judgment of this court is, that the judgment of the circuit court be affirmed.

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**NOTICE — BONA FIDE PURCHASER — SATISFACTION OF RECORD.** — Where the record shows that a prior mortgage has been satisfied, without showing by whom payment was made, a purchaser having no other notice than the record may assume that it was made by the party primarily liable; the purchaser need not go beyond the record: *Akers v. Freeman*, 48 Minn. 156; 24 Am. St. Rep. 206.

**EQUITY — INJUNCTION TO RESTRAIN EXECUTION OF JUDGMENT.** — Equity will restrain the enforcement of a judgment if any fact exists which clearly shows it to be against conscience, and of which the injured party might have availed himself, but was prevented from so doing by fraud or accident, without fault on his part: *Hibbard v. Eastman*, 47 N. H. 507; 32 Am. Dec. 467, and note; *Jones v. Hardesty*, 10 Gill & J. 404; 32 Am. Dec. 180.

**ESTOPPEL TO DENY AUTHORITY OF AGENT.** — If one who has been an at-



torney for a defendant accepts service of notice of appeal after his death, the party making such service being ignorant of his death, and if such attorney is retained by the representatives of the deceased, by concealing such death and failing to object to the jurisdiction of the court at the proper time, for the fraudulent purpose of preventing the proper service, delays making objection until too late to remedy the defect, the representatives of such deceased are estopped to deny that the notice was properly served: *Moyle v. Landers*, 78 Cal. 99; 12 Am. St. Rep. 22, and note.

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**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**TEXAS.**

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**HALE v. BONNER.**

[33 TEXAS, 33.]

**DAMAGES FOR MENTAL ANGUISH — NEGLIGENT DELAY IN DELIVERY OF CORPSE.** — A widow is entitled to recover for mental suffering as an element of damages, in an action against a railroad company for its negligent delay in the delivery of the body of her dead husband, shipped upon such railway.

*Todd and Rowell, and L. J. Shluter, for the appellant.*

*Gould and Camp, for the appellees.*

**GAINES, A. J.** The appellant brought this suit in the court below to recover of the appellees, as receivers of the International and Great Northern Railway Company, damages for a failure to deliver promptly the body of her deceased husband, under a contract with her for its carriage from San Antonio to Jefferson. She alleged in her petition, in substance, that her husband died at Boerne; that at the time they were sojourning at that place on account of his health, but that their home was in Jefferson; that she caused his body to be inclosed in a metallic casket and conveyed to San Antonio, where she immediately entered into contract with the agent of defendants for its carriage to Jefferson, by paying for and procuring a first-class passenger ticket to that place, known and marked as a "corpse" ticket; and that at the same time she procured tickets for herself and attendants over the same line to the same place. It was also alleged that on the twelfth day of the same month the body was delivered to the agents of the defendants and placed on board the train; that she took the same train and arrived at an early hour the next morning at

The depot at Jefferson, where her relatives and many friends were in waiting to accompany her dead husband to her home; but that, to her great mortification and distress of mind, she then ascertained that the casket containing the body had not arrived. It was further averred that, as she subsequently ascertained, the body, instead of having been sent forward by the train upon which she was carried, as should have been done, through the negligence of defendants' agents or servants was placed in a box car and left upon the side-track at Palestine, an intermediate station; that it did not reach Jefferson until the fourteenth day of the month; and that on account of its advanced state of decomposition, resulting from the delay, "it was with great difficulty and much additional pain and distress of mind that she and his friends could decently inter the said remains." The petition claimed damages for mental distress, and prayed also for a recovery of exemplary damages.

A demurrer to the petition was sustained by the court, and the plaintiff having declined to amend, her suit was dismissed.

She here complains of the ruling of the court upon the demurrer, and asks a reversal of the judgment.

We are unable to distinguish in principle this case from those in which recoveries against telegraph companies have been allowed for failure to deliver with promptness messages announcing the death or mortal illness of near relatives. Such cases are exceptional. As a rule, mental suffering is not an element of the damages which are recoverable for breach of a contract, or in an action for a tort founded upon a right growing out of a contract. Ordinarily the object of sending a telegraphic message announcing the death or sickness of a relative is to afford the person to be benefited the solace that may result from being present during the last illness of the relative, or attending his obsequies, as the case may be. The direct result of the failure to perform the duty of delivering the message being to deprive the person addressed of this solace, and to cause distress of mind, it is not unreasonable that he should have his compensation therefor. It is upon this principle, in my own opinion, that the decisions of this court in the telegraphic cases are to be maintained. The same principle applies in this case.

But however that may be, we see no valid reason why, if a recovery can be had for mental suffering resulting from failure to deliver a telegraph message announcing a death, like damages should be here denied.

In the case of *Western Union Tel. Co. v. Simpson*, 73 Tex. 422, the resulting injury was somewhat similar to that in the present case. But it is insisted that the mental suffering for which a recovery was sustained in that case was the immediate result of the delay in receiving the money which the company had contracted to deliver. Some disagreeable mental emotion is the ordinary result of the failure to pay or deliver money according to promise. But the measure of damages for the breach of the contract is the money to be paid or delivered, with interest. It was the fact that the plaintiff was detained in a distant state watching over the body of her deceased husband which sustained the recovery in that case.

The judgment is reversed and the cause remanded.

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MENTAL ANGUISH AS AN ELEMENT OF DAMAGES: See *Wyman v. Lewis*, 71 Mo. 227; 36 Am. Rep. 302, and note; *West v. Western U. Tel. Co.*, 30 Kan. 93; 7 Am. St. Rep. 530, and note 534-537; *Ordanford v. Doggett*, 32 Tex. 139; post, p. 859; note to *Western U. Tel. Co. v. Nations*, post, p. 922.

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## LYNE v. SANFORD.

[32 TEXAS, 93.]

**EXECUTORS AND ADMINISTRATORS — PROBATE SALES — IDEM SONANS.** —

"Forris" and "Farris" are *idem sonans*, and a probate sale of land belonging to the estate of Willis A. Farris, but originally granted to Willis A. Forris, will convey a good title.

**JURISDICTION OF PROBATE COURT — PRESUMPTION.** — A county court has general jurisdiction of the administration of estates, and when nothing to the contrary appears upon its records, it will be presumed, upon collateral attacks on its judgments, that it found the facts to exist that would give it jurisdiction.

**EXECUTORS AND ADMINISTRATORS — PROBATE SALES — COLLATERAL ATTACK.** — Objections that the order for a probate sale was obtained, and the sale made without the necessary notice, cannot be urged when the sale is collaterally attacked.

**EXECUTORS AND ADMINISTRATORS — PROBATE SALES — COLLATERAL ATTACK.** — Where an application by an administrator to sell land shows that the estate is indebted, and asks for an order to sell for the purpose of paying debts, the objection that the application discloses no cause for administration and no reason for a sale is not available in a collateral attack upon a sale under such order.

**EXECUTORS AND ADMINISTRATORS — PROBATE SALES — COLLATERAL ATTACK — ALLOWANCE OF CLAIM.** — An order of sale granted on application of an administrator to sell land for the payment of a specified debt amounts to an allowance of such debt, and the sale cannot be collaterally attacked on the ground that it occurred before such claim was presented or allowed.

**EXECUTORS AND ADMINISTRATORS — PROBATE SALES — COLLATERAL ATTACK.**

— Fraud in procuring an order for a probate sale, and in the sale thereunder, is available when the sale is directly attacked, but cannot be urged when it is collaterally assailed.

**EXECUTORS AND ADMINISTRATORS — PROBATE SALES — COLLATERAL ATTACK.**

— The absence of an exhibit under oath showing the condition of the estate, and what debts have been allowed at the time application is made by an administrator for an order to sell land, will not vitiate a sale made thereunder, upon collateral attack.

**EXECUTORS AND ADMINISTRATORS — PROBATE SALES — LAND CERTIFICATE.**

— Where a land certificate granted to a person by special statute is ordered sold by the probate court after his death in payment of his debts, the purchaser acquires a good title, especially if the certificate issues before the sale.

**EXECUTORS AND ADMINISTRATORS — LIMITATION ON GRANT OF ADMINISTRATION.**

— When the law in force at the time of the death of an intestate does not fix the time within which administration of his estate must be commenced, the fact that administration was granted more than ten years after his death does not render it void.

**EXECUTORS AND ADMINISTRATORS — PROBATE SALES — LAND CERTIFICATE.**

— A land certificate granted by special statute to the heirs of a person named, in consideration of his right to receive it personally, is not a gift to the heirs of the person named, but it forms part of the assets of his estate after his death, and during administration thereon is subject to sale for the payment of his debts.

**OFFICERS — MINISTERIAL ACT UNDER SPECIAL STATUTE — ISSUANCE OF LAND**

**CERTIFICATE.** — The act of the commissioner of a land-office in issuing a land certificate, as directed by special statute, is merely ministerial, and does not determine the ownership, nor divert the title from the person intended by the statute to receive it.

*A. K. Swan, H. N. Atkinson, and J. E. Bomar, for the appellants.*

*Davis and Harris, for the appellees.*

**FISHER, J., Section B.** This is a suit of trespass to try title instituted in the district court of Clay County, August 30, 1888, by appellants, against the unknown heirs of C. P. Runnell and the unknown heirs of B. E. Sanford and William Weaver. The land in controversy, as claimed in the original petition, was patented to the heirs of Willis A. Farris. The Sanford heirs answered and disclaimed as to all of the land sued for except a designated 1,505 acres. The Sanford heirs pleaded not guilty as to the 1,505 acres. Weaver by answer disclaimed as to the land sued for, except 320 acres, which he claimed by limitation. The plaintiffs at this stage of the case filed their first amended petition, seeking recovery only against the Sanford heirs (naming them) and against Weaver for the land claimed by them in their respective answers. The case below was tried before

the court without a jury, and judgment was rendered in favor of the defendants. It is admitted that the judgment is correct as to defendant Weaver, he being entitled to the 320 acres set up in his answer under his pleas of limitation. It is agreed that appellants are the heirs of Willis A. Farris, deceased, and it is also agreed that the defendants Sanford are the heirs of B. E. Sanford, and that they have a regular chain of title from William H. Stubblefield down to themselves for the 1,505 acres of the Farris survey, as set up in their answer.

February 11, 1850, the legislature passed an act for the relief of the heirs and legal representatives of Willis A. Farris, deceased. As the construction of this act is before us for our consideration, we will set it out in full.

"Section 1. Be it enacted by the legislature of the state of Texas, that the commissioner of the general land-office be and is hereby required to issue a certificate for one league and labor of land to the heirs or legal representatives of Willis A. Farris, deceased, and that the same be located, surveyed, and patented on and to any of the vacant and unappropriated lands of this state; provided, however, this act shall only be in force and effect if the party has not heretofore received his headright."

The act took effect from and after passage.

In obedience to this act, the commissioner of the general land-office, on April 15, 1852, issued to the heirs of Willis A. Farris a certificate for a league and labor of land. This certificate was located on the land in controversy, and the patent was issued to the heirs of Willis A. Farris August 14, 1855. William H. Stubblefield, from whom the defendants deraign title, purchased the certificate at an administrator's sale on the first Tuesday in May, 1852, from David Y. Portis, the administrator of the estate of Willis A. Farris. It appears from the record that January, 26, 1852, David Y. Portis presented his application in the probate court of Austin County, asking that he be appointed administrator of the estate of Willis A. Farris, who died intestate in the year 1841, and at the time largely indebted to the estate of John Cummings, and left no property except a claim to headright of a league of land. At the time of his death Farris was a citizen of Texas. At the February term, 1852, of the court, administration was granted on the estate of Willis A. Farris, and Portis appointed administrator. March 29, 1852, Portis qualified as administrator of the estate by executing the required bond and making oath as

required by law. On the same day the court appointed appraisers to make inventory of the property of the estate, who upon that day, together with the administrator, returned an appraisement and inventory of the property of the estate as "a certificate for one league and labor of land, to be issued by the commissioner of the general land-office to the legal representatives of said Farris," which the appraisers valued at five hundred dollars. March 29, 1852, Portis, as administrator, makes his application to the court, in which he asks for an order of sale of the claim for a headright certificate of a league and labor of land, to be issued under a special act of the legislature, and that this is all of the property of the estate of Farris. The sale is asked for the purpose of paying a claim held by Portis belonging to the estate of John Cummings, deceased, against Farris for the sum of two thousand six hundred dollars, and that the claim was in the shape of a mortgage on the headright of Farris, located in Bexar County, and that the mortgage was sent to Bexar County for registration, but neither the mortgage nor the record thereof can be found. The application further states that the headright of said Farris was rejected by the board of traveling land commissioners, and that the special act of the legislature was passed at the special instance of the applicant. The application further states that there are no funds of the estate to meet the costs and expenses of administration. On March 29, 1852, the court heard the application and ordered the sale of the headright certificate of Willis A. Farris for one league and labor of land. The order requires the certificate to be sold at public outcry to the highest bidder on a credit of twelve months. After due notice, October 26, 1852, the administrator made his report of the sale of the certificate, in obedience to the order, after giving legal notice; that the certificate was sold on the first Tuesday in May, 1852, to W. H. Stubblefield, on a credit of twelve months, for the sum of seven hundred dollars, his being the highest and best bid. At the October term, 1852, the court confirmed the sale of the certificate, and the order recites that the administrator had made a deed to Stubblefield, which the court approves. May 10, 1852, Portis, as administrator of the the Farris estate, executed a deed to Stubblefield, conveying the certificate. Appellants contend that this administration and sale of the certificate is void, and conveyed no title to Stubblefield in the land by reason of his purchase of the certificate.



"1. Because the grant of the certificate and the certificate itself, located upon the land sued for, was to heirs of Willis A. Farris, and the administration was upon the estate of Willis A. Farris, and the certificate sold to Stubblefield was the head-right of Willis A. Farris, and not Willis A. Forris." We believe the names "Farris" and "Forris" are *idem sonans*: 16 Am. & Eng. Ency. of Law, 122-124. But however this may be, it is reasonably apparent that Willis A. Forris and Willis A. Farris is the name applying to the same person, and that the spelling of the name differently arose out of errors and mistakes committed in preparing the certified copies of the instruments and records from the secretary of state's office and the land-office that are in evidence in the case. In the certified copies of records offered in evidence by plaintiff, the name appears "Forris." In the certified copies introduced by defendant the name is spelled "Farris."

"2. Because it does not appear that Farris died in Austin County, or had any assets or property there, and therefore the court had no jurisdiction to grant the administration." The county court of Austin County had general jurisdiction concerning the administration of estates. Nothing to the contrary appearing upon the record, it will be presumed, when its judgments are collaterally attacked, that it found the facts to exist that would give it jurisdiction.

"3. That the order of sale was obtained and the sale of the certificate made without notice being given beforehand." These objections are only available in a direct proceeding, and cannot be urged when the sale is collaterally questioned: *Hurley v. Barnard*, 48 Tex. 87; *Heath v. Layne*, 62 Tex. 691; *George v. Watson*, 19 Tex. 368.

"4. That the application shows no cause for administration and no reason for a sale of the certificate." The application shows that the estate was indebted, and asks for sale of certificate for the purpose of paying debts. Whatever may be the object in the application in this respect, the objections cannot be heard in this case: *Hurley v. Barnard*, 48 Tex. 87.

"5. That the certificate was sold before the claim of Cummings's estate was presented and allowed." The application for order of sale sets out this claim, and asks that the certificate be sold for the purpose of paying the debt. The court grants the order of sale as asked. The application for order of sale was made by the administrator. This is tantamount

to an allowance of the claim by the administrator and an approval by the court: *Allen v. Clark*, 21 Tex. 405.

"6. That the administration and sale of certificate was fraudulent, and that the Cummings claim was barred on its face, and as a debt it would not support an administration." These are proper objections to be urged in a direct attack upon the administration, but cannot be heard in this case: *Firebaugh v. Ward*, 51 Tex. 414; *Capt v. Stubbs*, 68 Tex. 223.

"7. That the application for sale was not accompanied by an exhibit under oath of the condition of the estate showing what debts had been allowed." A failure to attach such exhibit would not render the sale void. A sworn appraisement and inventory was made before sale, showing the condition of the estate: *Finch v. Edmonson*, 9 Tex. 504, and *Miller v. Miller*, 10 Tex. 833, are relied upon by appellant as authority. The first case is questioned in *Hurley v. Barnard*, 48 Tex. 87, and is impliedly overruled in *Heath v. Layne*, 62 Tex. 692. The latter case is explained by *Allen v. Clark*, 21 Tex. 405, and the expressions in the opinion that supports the contention of appellants are disapproved.

"8. That the certificate was not in existence at the time the order of sale was made, and was not inventoried as assets of the estate." The special act of the legislature was in existence at the time the order was made granting the right to sell the certificate, and the certificate was issued before the sale. The right of Farris's estate flowed from the act of the legislature, and was, at the time of the order, an existing right.

"9. That the administration, being granted on Farris's estate more than ten years after his death, was void.' This objection is not tenable. This was the first grant of administration upon Farris's estate. The then existing law did not fix a time when administration should commence after the death of the intestate: *Martin v. Robinson*, 67 Tex. 375. The sale and order of sale are not subject to collateral attack for this reason.

"10. That the certificate was not assets of the estate of Farris, but the property of the heirs of Farris; therefore not subject to administration, for the reason that it was a donation to the heirs under the special act of the legislature." By reference to the special act, it will be seen that the legislature in granting this certificate recognized that Willis A. Farris had before his death earned the right to a headright certificate of a league and labor, and in recognition of this right they granted to his heirs or legal representatives the certificate, if he had

not heretofore received his headright. The terms of this act clearly imply that the consideration that moved the legislature to grant the certificate was the right existing in Farris by reason of his having complied with the laws under which the certificate was earned. If this was the purpose of the legislature, the grant cannot be regarded as a gratuity or donation to the heirs: *Hill v. Kerr*, 78 Tex. 218; *Rogers v. Kennard*, 54 Tex. 34.

"11. That the special act granting the certificate required the commissioner of the general land-office to issue to the heirs or legal representatives the certificate, and the certificate being issued by him to the heirs was the exercise of a discretionary act upon his part, and so issuing, vested the absolute title in the heirs." There is nothing in the special act that confers the right upon the commissioner to decide which class of persons mentioned in it shall be entitled to the certificate. The act that granted the right directed the title, and the commissioner had no power to divert it. His duty was simply ministerial. He had no authority to pass upon the rights of the claimants to the certificate so as to conclude them. The issuance of the certificate to the heirs does not make it their individual property, but the certificate is subject to the payment of their deceased ancestor's debts, and is assets of his estate.

We find no error in the judgment, and report the case for affirmance.

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**IDEM SONANS.** — Notes collecting cases on this subject will be found appended to *State v. White*, ante, p. 783; *Schooler v. Ashcraft*, 13 Am. Dec. 232; and *Parchman v. State*, 28 Am. Rep. 439. The effect of a conveyance by or to a party under a wrong name is discussed in the note to *Fallon v. Kates*, 99 Am. Dec. 347.

**THE ORDERS AND JUDGMENTS OF PROBATE COURTS**, when acting within their jurisdiction, are entitled to the same favorable presumptions and the same immunity from collateral attack as are accorded to those of courts of general jurisdiction: *Sherwood v. Baker*, 105 Mo. 472; 24 Am. St. Rep. 399, and note; *Weems v. Masterson*, 80 Tex. 45. Where jurisdiction of a court depends on the finding of a particular alleged fact, the exercise of jurisdiction implies the finding of that fact: *Thornton v. Baker*, 15 R. L. 553; 2 Am. St. Rep. 925; *Houston v. Killough*, 80 Tex. 296.

**EXECUTION SALES — NOTICES.** — Failure of sheriff to post notice of sale of land under execution in front of the court-house, as required by law, is a mere irregularity which cannot affect the title of an innocent purchaser in a collateral proceeding: *Evans v. Robberson*, 92 Mo. 192; 1 Am. St. Rep. 701; compare *Whitaker v. Ashbey*, 43 La. Ann. 117. An example of sale held void because of the posting of the notice in the wrong place will be found in *Moody v. Moeller*, 72 Tex. 635; 13 Am. St. Rep. 839.

A JUDGMENT OBTAINED AGAINST A PERSON BY FRAUD cannot be assailed collaterally: *Ogle v. Baker*, 137 Pa. St. 378; 21 Am. St. Rep. 886; *Morrill v. Morrill*, 20 Or. 96; 23 Am. St. Rep. 95. See also *Williams v. Haynes*, 77 Tex. 283; 19 Am. St. Rep. 752.

JURISDICTION OF PROBATE COURT ATTACHES when a petition is filed by the proper party, setting forth any of the statutory grounds for a sale; and jurisdiction having once attached, any intervening errors or irregularities in the proceedings will not avail to avoid the sale when collaterally impeached: *Goodwin v. Sims*, 86 Ala. 102; 11 Am. St. Rep. 21. The absence of an accurate and exact description of realty of a decedent, in a petition for an order of sale, will not render the sale void: *Stuart v. Allen*, 16 Cal. 473; 76 Am. Dec. 551. A petition for the sale of lands belonging to a decedent may properly refer to the schedules of the inventory of such estate for a particular description of such lands: *Richardson v. Butler*, 82 Cal. 174; 16 Am. St. Rep. 101. Whether the opinion of the court in the principal case would have been different if no appraisal and inventory showing the condition of the estate had been made before the sale, *quære*.

THE EFFECT OF THE STATUTE was to confer on the grantee of the land an inchoate title, which was a vested right, and therefore property capable of being transferred. Similarly, in *Lang v. Morey*, 40 Minn. 396, 12 Am. St. Rep. 748, it was held that a valid mortgage might be given by one who had made entry under the homestead laws of the United States, upon the land so entered, before he had made his final proof and received the certificate thereof.

A MINISTERIAL ACT is one which a person performs under a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, and without regard to or the exercise of his own judgment upon the propriety of the act being done: *Flournoy v. City of Jeffersonville*, 17 Ind. 169; 79 Am. Dec. 463.

## CRAWFORD v. DOGGETT.

[32 TEXAS, 139.]

DAMAGES FOR MENTAL ANGUISH — WRONGFUL SEQUESTRATION. — Mental distress or suffering is not an element of the actual damages sustained from the wrongful suing out of a writ of sequestration and a seizure thereunder. In order to recover for mental anguish, the suing out of the sequestration must be both wrongful and malicious, so as to justify a recovery for exemplary damages.

HUSBAND AND WIFE — LIABILITY OF WIFE FOR TORT. — A wife is liable for wrongfully suing out a writ of sequestration jointly with her husband, unless she acts under his coercion.

*Drury Field*, for the appellants.

*D. M. Short and Son*, for the appellee.

GAINES, A. J. The appellants, who are husband and wife, brought this suit to recover of appellee a tract of land upon which he was living with his family. They also sued out a

writ of sequestration, by virtue of which the sheriff dispossessed the defendant of the property, and held it until it was replevied by the latter. The defendant pleaded in reconvention, alleging that the writ of sequestration was unlawfully and maliciously issued, and prayed for the recovery of both actual and exemplary damages. He averred in his plea that when dispossessed of his property he had been compelled to seek shelter for himself and for his wife and children with his neighbors until he succeeded in giving the replevy bond, and asked compensation for mental suffering as actual damages in the case. The plaintiff dismissed his suit, and the parties went to trial upon the plea in reconvention. The jury returned the following verdict: "We the jury find for the defendant, A. W. Doggett, against the plaintiffs, E. E. and W. H. Crawford actual damages as follows: For time lost, five days (\$1 per day), \$5; for loss of use of premises, rental value, \$5; for injury to feelings, \$190. Total \$200."

The court, in an elaborate charge, instructed the jury that if they found that the writ of sequestration was wrongfully issued, they should return a verdict for defendant for his actual damages, and that the injury to his feelings was an element of such damages; and also that if they found that the writ was both wrongfully and maliciously issued, they should give exemplary damages.

So much of the charge as instructed the jury that injury to the plaintiff's feelings was an element of actual damages is assigned as error, and we think the assignment well taken. In the case of *Trawick v. Martin Brown Co.*, 79 Tex. 460, after mature consideration, this court held that injury to feelings could not be recovered in a suit for wrongfully suing out an attachment; but that if the writ were maliciously issued, and exemplary damages were recoverable, distress of mind produced by it was proper to be considered by the jury in assessing such damages. The same principle applies in this case. There is no statement of facts in the record, but no evidence could have been introduced which would have rendered the instruction proper. The verdict shows that the appellants were prejudiced by it.

It is insisted that there is fundamental error, because the wife was not responsible for the consequence of the wrongful suing out of the writ of sequestration. But the wife is liable for her torts, unless she act under the coercion of her husband.

The judgment is reversed, and the case is remanded.

**DAMAGES FOR MENTAL ANGUISH:** See *Hale v. Bonner*, 82 Tex. 33; ante, p. 850.

**LIABILITY OF WIFE FOR TORT.** — A wife is personally liable for tort committed by her, unless her husband was both present and directed the doing of it at the time, in which case he alone is liable: *Wheeler etc. Mfg. Co. v. Heil*, 115 Pa. St. 487; 2 Am. St. Rep. 575; *Franklin's Appeal*, 115 Pa. St. 534; 2 Am. St. Rep. 583. Cases on the subject will be found collected in the note to *Wheeler etc. Mfg. Co. v. Heil*, 115 Pa. St. 487; 2 Am. St. Rep. 575.

## MISSOURI PACIFIC RAILWAY CO. v. HEIDENHEIMER.

[82 TEXAS, 196.]

**BILLS OF LADING — ASSIGNMENT — STOPPAGE IN TRANSITU.** — A bill of lading is a quasi negotiable instrument symbolizing the property described therein, and the delivery of the bill, with an assignment indorsed thereon, transfers to an assignee in good faith and for value a perfect title to the goods, thus defeating the seller's right of stoppage *in transitu*, though the goods are actually in transit at the time of the assignment.

**BILLS OF LADING — ASSIGNMENT AS PLEDGE — STOPPAGE IN TRANSITU.** — The transfer of a bill of lading, by way of pledge or as collateral security for a loan, though it may not absolutely defeat the seller's right of stoppage *in transitu*, prevents him from asserting that right as against the transferee, until he has discharged the debt secured by the transfer.

**BILLS OF LADING — ORIGINAL AND DUPLICATE — ASSIGNMENT — STOPPAGE IN TRANSITU.** — Two bills of lading, one marked "original" and the other "duplicate," issued by a railway company for the same goods, are of equal value, and the transfer by indorsement of the one marked "duplicate" by the consignee, who holds the legal title, to a *bona fide* assignee for value as collateral security, transfers the title to the goods, and defeats the seller's right of stoppage *in transitu*.

**TELEPHONE CONVERSATIONS ET**, when pertinent, are admissible in evidence.

**COMMON CARRIERS — LIABILITY FOR FAILURE TO DELIVER — DEMAND.** —

It is the duty of a railway company, as a common carrier, to deliver the goods to the true owner or his assignee at its peril, and its failure to so do constitutes a conversion for which suit may be maintained without previous demand.

**COMMON CARRIERS — NON-DELIVERY — DEFENSES — STOPPAGE IN TRANSITU.**

— Non-delivery of goods by a common carrier is excused when the consignor exercises his right of stoppage *in transitu*, but such right must be possessed by the consignor before it can be invoked by the carrier as a defense for failure to deliver.

**EVIDENCE.** — RECORD IN ANOTHER SUIT, to which defendant was neither a party and in which he was not interested, giving the names of certain persons as members of a firm, is inadmissible to show that plaintiff is not a member of that firm, as claimed by defendant.

*Barnard and Green, and McLeary and King*, for the appellants.

*C. Upson*, for the appellee.

TARLTON, J., Section B. This suit was brought August 10 1885, for non-delivery of five hundred boxes of candles, by Isaac Heidenheimer, against the Missouri Pacific Railway Company and the International and Great Northern Railway Company, as connecting carriers with the St. Louis, Iron Mountain, and Southern Railway Company. As an innocent holder for value of the bill of lading, plaintiff sued and recovered judgment. The following facts, most of which are contained in the court's conclusions, and all of which are justified, we think, by the record, were developed on the trial: —

On February 13, 1884, Turnley Brothers & Co., merchants residing at Galveston, Texas, bought from one George F. Tower, doing business as the Goodwin Manufacturing Company, of St. Louis, Missouri, 500 boxes of candles, of the value of \$2,634. By their direction the goods were on said day consigned and shipped by the Goodwin Manufacturing Company to Turnley Brothers & Co., at San Antonio, Texas. The carrier issued and delivered to the Goodwin Manufacturing Company two documents, each purporting to be a bill of lading for the goods, signed by the carrier, and consigned to Turnley Brothers & Co. at San Antonio, Texas; the one, however, stamped "original" and the other "duplicate." The consignor sent to Turnley Brothers & Co. at Galveston the bill of lading stamped "duplicate," referring to it in the letter inclosing it as a "bill of lading," and sending with it an invoice of the goods. The consignor retained the original, which never passed out of its hands until it was delivered to the carrier on the return of the goods, as hereinafter shown. The terms of the sale were part in cash and part by the note or acceptance of Turnley Brothers & Co., which cash and note were received by the Goodwin Manufacturing Company February 22, 1884. The goods were shipped over the St. Louis, Iron Mountain, and Southern railway, via the International and Great Northern, and the Missouri Pacific railways as connecting lines, to San Antonio, where they arrived February 24 or 25, 1884.

On the evening of February 23, 1884, Turnley Brothers & Co. transferred, and by their indorsement assigned, the duplicate bill of lading to Isaac Heidenheimer, and delivered it to him. This transfer and assignment was in consideration of and as collateral security for a loan in cash of three thousand or three thousand five hundred dollars at the time made by Isaac Heidenheimer to Turnley Brothers & Co. When this



transfer was made Turnley Brothers & Co. were actually insolvent, but Heidenheimer did not know that fact, nor had he any reason to suspect it until after the loan and the transfer.

February 25, 1884, Turnley Brothers & Co., by telegram, informed the Goodwin Manufacturing Company that they were in trouble, and directed it to stop the goods. In accordance with this notice, afterward confirmed by letter of the same date, the Goodwin Manufacturing Company on said day called on the Missouri Pacific Railway Company, notified it to stop the goods, and at the time delivered to it the bill of lading stamped "original," which was produced and read in evidence on the trial. The defendants returned the goods, in compliance with the consignor's order, about February 26, 1884.

We shall first consider appellants' second and fourth assignments of error, as in our opinion they present the pivotal questions in this case. In these assignments it is contended that the duplicate bill of lading sent by the Goodwin Manufacturing Company to Turnley Brothers & Co. did not carry with it the property described therein, and that as the original bill of lading was retained by the consignor for the purpose of holding the legal title to the goods until delivered, and as during transit the consignees became insolvent and one half the price was unpaid, the right of "*stoppage in transitu*" was properly exercised; that the transfer of the duplicate bill of lading in the manner and form stated could not operate to defeat such right.

A bill of lading is regarded as a quasi negotiable instrument. It symbolizes the property which it describes. The assignment of a bill of lading indorsed thereon, accompanied by delivery of the instrument, passes to the assignee title to the goods, though actually in transit, as complete as if they had passed through the buyer's hands, and been delivered bodily to the assignee. When by such an assignment the consignee transfers it for value to a third party acquiring it in good faith, the right of "*stoppage in transitu*" is defeated: Daniel on Negotiable Instruments, 3d ed., secs. 1727, 1728, 1730; 23 Am. & Eng. R. R. Cas. 703, note, *Stoppage in Transitu*; 2 Am. & Eng. Ency. of Law, 242, 244. It is held, also, by some authorities that where a bill is so assigned as collateral security, the rights of the pledgee thereunder are the same as those of an actual purchaser of the goods for value, so far as the exercise of those rights is necessary for the holder's protection;

and that one who makes a temporary advance to the vendee, taking the bill as his security, has the same rights as the buyer of the goods: 2 Am. & Eng. Ency. of Law, 243, 244, and note 4; 1 Wait's Actions and Defenses, pp. 528, 529, sec. 11; *Campbell v. Alford*, 57 Tex. 162; *Adoue v. Seeligson*, 54 Tex. 594.

In any event, it must, we think, be conceded that if the transfer of a bill of lading by way of pledge or mortgage, or as collateral security for a loan, does not absolutely defeat the right of "stoppage in transitu," the seller cannot exert that right until he has discharged the debt secured by the transfer, as his right is subject to that of the mortgagee or pledgee: *Chandler v. Fulton*, 10 Tex. 2; 60 Am. Dec. 188; 1 Wait's Actions and Defenses, p. 529, sec. 13. Applying, then, the foregoing principles to the facts connected with the assignment by Turnley Brothers & Co. to Heidenheimer, it follows that the transfer defeated the consignor's right of "stoppage in transitu," provided that the duplicate bill of lading should, under the circumstances of this case, be regarded in the same light as the original. The question then arises, Does the instrument stamped "duplicate" possess the same validity as the one stamped "original"? Each was signed by the same carrier, deliverable to the same consignee, and expressed a receipt for the same goods.

In Daniel on Negotiable Instruments, 8d ed., sec. 1787, we find the following language: "Where there are several bills of lading, each is a contract in itself as to the holder, but there is one contract as to the masters and owners. Therefore, if the several numbers of the set of bills of lading be indorsed to different persons, and there be competition for the goods, the rule is, that if the equities be equal the property passes by the bill first indorsed." "The usual course is to issue bills in triplicate originals, one to be retained by the carrier, one to be delivered to the shipper, and one to the consignee; and the person who first gets one of the three gets the property which it represents": 2 Rorer on Railways, 1317; Benjamin on Sales, 2d ed., 684.

When the bill inclosed to Turnley Brothers was by them transferred to Heidenheimer, it was not the less, in our opinion, to be regarded by him as an original because it was stamped "duplicate." It is to be presumed that he understood the word "duplicate" according to its legal significance, and he is to be considered as being affected with such

notice, and no other, as the word so interpreted would give him. In law the word "duplicate" does not mean a mere copy. It differs from a copy in that a duplicate has all the validity of an original. Instruments are executed in duplicate, that the parties may each retain an original: Black's Law Dict., word Duplicate, p. 401; see also Burrill. And so Mr. Greenleaf (vol. 1, sec. 558), lays it down that "if the instrument was executed in duplicate or triplicate, or more parts, the loss of all its parts must be proved to let in secondary evidence of its contents," thus indicating that all the parts are upon the same plane, — each is to be regarded as an original.

Under the evidence in this case, it cannot be doubted that the consignees had the legal title to the goods at the time of the assignment to appellee. They had complied with the terms of the purchase, having paid one half the purchase-money, and executed their note or acceptance, due in sixty days, for the remainder. They were in possession of the document, which, together with an invoice of the goods, had been inclosed to them as the bill of lading to which they were entitled. If at that time the goods had reached San Antonio, and the consignees or any assignee from them had presented the duplicate and demanded delivery of the carrier, could he have declined because they produced a bill of lading stamped "duplicate"? Could the carrier have exacted the production of the original, on the ground that it had been retained by the consignor, with a view to the exercise of its right of "stoppage *in transitu*," in the event of the insolvency, though unsuspected, of the consignees, or of their failure to pay the remainder of the purchase-money, though not due within sixty days? We think not. We therefore conclude that, under the facts of this case, the duplicate bill of lading in the hands of appellee possessed all the validity of the original; that it was as to appellee an original, not a copy; that the word "duplicate" stamped on the instrument should be held to indicate to the appellee no more than that the bill of lading had been executed in duplicate, and that by its transfer for value to appellee, the Goodwin Manufacturing Company was precluded from exercising its right of "stoppage *in transitu*." We are aware that the opinion of Turner, J., in *Castanolia v. Missouri Pac. R'y Co.*, 24 Fed. Rep. 268, conflicts with the view here expressed with reference to the effect of the word "duplicate," but the conclusion reached by us seems to

be supported by the great weight of authority. Our conclusion is, of course, expressed only with reference to the facts of this case.

After appellee had obtained the duplicate bill of lading, it appears that between the twenty-fifth and last of February, 1884, he telegraphed from Galveston to A. B. Frank & Co., of San Antonio, authorizing them for him to demand and receive the candles from the carrier. One W. H. Weiss, foreman of A. B. Frank & Co., was thereupon permitted by the court to testify that "he made demand for the candles through the telephone; that he asked for the Missouri Pacific freight office, and presumed it was given him; that he asked if the candles in controversy were there, and told the person at the other end of the line that he had authority to receive them, and was answered by said person that the candles had been shipped back to St. Louis; that he did not remember who spoke to him through the telephone from the other end of the line, as so many changes had been made in that office, but he recognized the voice of the person answering at the time as one of the employees of the office with whom he had transacted business at that office; that he was accustomed to transact business with defendant's office by telephone." Objection was made to the admission of this evidence, because the witness could not state the name of the party who answered his message, nor that he was the agent of the defendant. The action of the court in overruling the objection is assigned as error. We think the objection, considered with reference to the reasons urged for the exclusion of the evidence, was properly overruled. The circumstances detailed by the witness indicated that the person with whom he was in communication was the agent of the defendant, the Missouri Pacific Railway Company. The inability of the witness to give the name of the person would bear rather upon the question of the weight than the admissibility of the evidence.

The court in its fourth conclusion of facts found that plaintiff, between the twenty-fifth and twenty-eighth days of February, 1884, demanded delivery of the candles from defendants. This finding is assigned as error, as being unsupported by the evidence. We think the assignment well founded. The only evidence introduced with reference to a demand made of the defendants was that of the witness Weiss; and while this witness testified that he made a demand, his testimony wholly failed to show that he made the demand in the name of the

plaintiff, or that he notified the defendants that he was representing the plaintiff. We further think, however, that this error is harmless. Such a demand was in our opinion immaterial. It is the duty of the carrier, in discharge of his undertaking, to deliver the goods to the consignee or his assigns. He must at his peril deliver the goods to the true owner. He must suffer the consequences of a mistake, however honestly made. If he deliver, however innocently, the property to the wrong person, such misdelivery becomes a conversion: 2 Am. & Eng. Ency. of Law, 890; *Price v. Oswego etc. R'y Co.*, 50 N. Y. 213; 10 Am. Rep. 475. He is excused, however, for non-delivery where the consignor exercises his right of "stoppage in transitu"; but it is evident that such right must exist in the consignor before it can be exercised by him. It must be possessed by the consignor before it can be invoked by the carrier. On February 25, 1884, when the Goodwin Manufacturing Company ordered the return of the goods, the right in it of "stoppage in transitu" was wholly wanting. It had been, as shown by the authorities heretofore cited, defeated by the transfer on February 23, 1884, of the bill of lading by Turnley Brothers & Co. to appellee for value. It had been as thoroughly defeated as if, without the carrier's knowledge, the indebtedness by Turnley Brothers & Co. to the consignor had been wholly paid, or as if they had in fact been solvent when the order for the return of the goods was made. The defendants or their representative had issued the bill of lading, original and duplicate. Inquiry prosecuted by them with the reasonable diligence of a prudent man would doubtless have resulted in ascertaining the facts of the transfer to Heidenheimer. The misdelivery by defendants of the goods, by their return to the consignor, was therefore a conversion of the property. A demand is unnecessary to justify a suit for conversion.

The preceding remarks have reference to the question raised by appellants' first, second, fourth, fifth, and eighth assignments of error. We have deemed it best to consider these assignments in their logical rather than their serial order. We shall now consider the remaining assignments.

It was contended by appellants on the trial that the appellee, Heidenheimer, was a member of the firm of Turnley Brothers & Co. at the time of the transfer relied upon by him. In rebuttal of evidence introduced in support of this contention, appellee, over objection of appellants, used the record of a case filed March 8, 1886, in the district court of Bexar County,

wherein Turnley Brothers & Co., in their original petition, stated that Turnley Brothers & Co. was a firm composed of James B. and William F. Turnley. Appellants in their third assignment complain of the admission of this evidence as error. It does not appear that the evidence was offered for the purpose of impeaching the statements of appellants' witnesses as to the existence of such a partnership. No predicate had been laid for that purpose. One of the grounds of objection by appellants was, "that the defendants were not parties to said suit, and were not affected or bound by the statements made therein." This objection should have been sustained. The court erred in admitting the petition; and we are unable to say that the improper evidence did not influence the court in its conclusions. We infer that it did, in the absence of an intimation to the contrary. If so, the judgment of the court was erroneously influenced on a material question; because, if appellee was a member of the firm of Turnley Brothers & Co., it is plain that he could not occupy the attitude of an innocent holder for value of the bill of lading.

Appellants' sixth assignment of error indicates a misapprehension of the court's first conclusion of fact, to which it refers. The conclusion is not, as appellants contend, to the effect simply "that the candles were paid for by consignees when purchase was made," but "that said candles were paid for according to the terms of the sale, part in cash and part by the note or acceptance of said Turnley Brothers & Co., payable in sixty days," and received by the consignor February 22, 1884. This finding is supported by the evidence.

Appellants' seventh assignment charges error in the court in finding that the duplicate bill of lading was transferred as collateral security, whereas, as appellants here contend, the candles were sold to plaintiff, and not transferred as collateral security. We think that the evidence fully supports this finding of the court; but if the candles were really sold, instead of being transferred as security, this fact could not possibly benefit appellants or impair the condition of appellee. If appellee be entitled to protection as a *bona fide* mortgagee, he would certainly be protected as a *bona fide* purchaser.

In their ninth, tenth, and eleventh assignments, appellants complain that the court erred in the following conclusions of fact: 1. That plaintiff did not know or have reason to believe that Turnley Brothers & Co. were insolvent at the time that the duplicate bill of lading was indorsed to him; 2. That

the firm of Turnley Brothers & Co. was composed solely of James B. Turnley and William F. Turnley, and that plaintiff was not at that time a partner of said firm, or connected with the business of said firm; 3. That upon the return of said candles to the Goodwin Manufacturing Company, said company was indebted to said Turnley Brothers & Co. in the sum of \$1,043.59.

The findings referred to were each of them, we think, supported by the evidence, except as to the issue of partnership, about which we express no opinion, as evidence thereon was, as already shown, erroneously admitted.

Appellants finally rely upon an additional or twelfth assignment of error, in which they charge that as to the Missouri Pacific Railway Company there was no evidence proving or tending to prove that said company ever had possession of the candles, or any connection with their transit or return or "stoppage *in transitu*." The witness Tower stated that he gave the original bill of lading to the Missouri Pacific Railway Company, and supposed it was still in possession of the company; this company, together with the International and Great Northern Railway Company, produced the bill in evidence; it admits in its special answer that the bill was delivered to it and its co-defendant; that the goods were transported by appellants to San Antonio, and were by them, or the order of the consignor, returned to it. We do not think this assignment well founded.

For the error pointed out, however, the judgment should be reversed and the cause remanded.

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**BILLS OF LADING — QUASI NEGOTIABLE INSTRUMENTS.** — A bill of lading has the attribute of negotiability in a qualified and restricted sense, and by indorsement and delivery thereof the property therein described may be transferred: *Nat. Bank of Commerce v. Chicago etc. R. R. Co.*, 44 Minn. 224; 20 Am. St. Rep. 566, and note; *Davenport Nat. Bank v. Homeyer*, 45 Mo. 145; 100 Am. Dec. 363, and note; note to *Bank of Rochester v. Jones*, 55 Am. Dec. 299, 300; note to *Chandler v. Sprague*, 38 Am. Dec. 419-426; *First Nat. Bank v. Meyer*, 43 La. Ann. 1.

**SALES — STOPPAGE IN TRANSITU — INDORSEMENT OF A BILL OF LADING.** — As to when an indorsement of a bill of lading defeats the right of stoppage *in transitu*, see note to *Hause v. Judson*, 29 Am. Dec. 392, 393; note to *Rucker v. Donovan*, 19 Am. Rep. 91, 92.

**BILLS OF SALE — ASSIGNMENT AS COLLATERAL SECURITY.** — A *bona fide* assignee for value of a bill of lading as collateral security is deemed the owner of the property therein described to the extent of giving security for the payment of the pledge: *First Nat. Bank v. Meyer*, 43 La. Ann. 1.



**TELEPHONE, CONVERSATIONS BY — EVIDENCE.** — As to the admissibility in evidence of conversations by telephone, see note to *Central U. Tel. Co. v. Falley*, 10 Am. St. Rep. 135, 136; *Wolfe v. Missouri Pac. R'y Co.*, 97 Mo. 473; 10 Am. St. Rep. 331; *Reed v. Burlington etc. R'y Co.*, 72 Iowa, 166; 2 Am. St. Rep. 243.

**CARRIERS OF GOODS — EXCUSE FOR NON-DELIVERY.** — In an action against a carrier for non-delivery of goods, it is a good defense, even against an innocent indorsee of a bill of lading, that the property was taken from his possession by one having a paramount title: *Nat. Bank of Commerce v. Chicago etc. R. R. Co.*, 44 Minn. 224; 20 Am. St. Rep. 566.

**CARRIERS OF GOODS — DELIVERY.** — As to whom a carrier may lawfully deliver property, as well as his liabilities for a misdelivery, see monographic note to *Weyand v. Atchison etc. R'y Co.*, 9 Am. St. Rep. 511-514; *Wolfe v. Missouri Pac. R'y Co.*, 97 Mo. 473; 10 Am. St. Rep. 331, and note.

**CARRIERS — CONVERSION.** — As to when a carrier is guilty of conversion, see note to *Bolling v. Kirby*, 24 Am. St. Rep. 815, 816.

## LECOMTE v. TOUDOUZE.

[32 TEXAS, 203.]

**BOUNDARY BY PAROL AGREEMENT — FACTS COMPETENT TO ESTABLISH.** —

Where the question before the jury as to the location of a boundary line resting in parol agreement between the parties depends upon reference to calls in deeds admitted in evidence, the jury are properly permitted to look to the deeds and surrounding circumstances to ascertain the boundaries of the land conveyed.

**ADVERSE POSSESSION — BURDEN OF PROOF.** — A party who claims land by adverse possession under the statute of limitations has the burden of proof to fix the extent of his possession.

**BOUNDARY BY PAROL AGREEMENT — HARMLESS ERROR.** — Where the jury, upon sufficient evidence, find the location of a boundary line resting in parol agreement between the parties, harmless and abstract errors in admitting or rejecting evidence, or in the charge as to the locality of the boundary line between them, are not grounds for reversal.

**BOUNDARY BY PAROL AGREEMENT — STATUTE OF FRAUDS.** — An oral agreement between adjoining owners establishing a boundary line between their lands is not prohibited by the statute of frauds, nor within the meaning of statutes regulating the manner of conveying real estate.

**BOUNDARY BY PAROL AGREEMENT — ESTABLISHING.** — It is not necessary to the validity of a boundary between adjoining owners, resting in parol agreement, that it should be supported by acquiescence, or acts from which an estoppel may spring. If the agreement is made under circumstances free from facts that would authorize a court of equity to set it aside, it must stand, although the parties may have been mistaken in their belief that the line agreed upon approximates to the true line as it is afterwards found to exist.

**BOUNDARY BY PAROL AGREEMENT — BINDING EFFECT ON MARRIED WOMAN.** — A married woman who is a party to a parol agreement establishing a boundary line between adjoining owners is estopped to deny its existence as affecting her separate property.

*J. H. McLeary*, for the appellants.

*Denman and Franklin*, for the appellees.

FISHER, J., Section B. This is an action of trespass to try title, and for damages, brought by appellants against appellees to recover a strip of land lying between the farms of the parties, and for rents and profits, and damages for timber destroyed, in the sum of \$650, and praying for an injunction to stay waste, etc. Defendants pleaded want of equity in bill, etc.; and also pleaded the statute of limitation of three, five, and ten years; and that plaintiffs have taken a part of defendants' land; and pray for rents, profits, etc. Plaintiffs also claim title by ten years occupancy of the land in controversy, and also plead the three and five years statutes of limitation. Defendants further plead that the boundary line was settled by a verbal agreement between the parties and run out by a surveyor; and the suit finally resolved itself into a controversy concerning a boundary line.

The jury found the following verdict: "We, the jury, find from the evidence that the line established by County Surveyor Locke was agreed upon by all parties, and find in favor of defendant."

The land in controversy is a part of the Manuel De Luna grant, situated on the south bank of the Medina River. The plaintiffs claim so much of the De Luna grant as was not previously sold by Lecomte De Watine, the father of plaintiff Leon Lecomte, and the former owner of the survey, under a decree of partition of the estate of Lecomte De Watine, rendered in 1870, by which decree about three thousand acres of the De Luna survey was awarded Leon Lecomte. Leon Lecomte is the husband of plaintiff Octavia T. Lecomte. She holds under a deed from Henry Toudouze, who had previously purchased from Leon Lecomte. There is not in the decree of partition any description of the De Luna grant, nor is there in any of the deeds in plaintiffs' line of title any description of the land given, except that it is bounded by other surveys (naming them) and by the Medina River. The field-notes of these other surveys are not in the record. It is admitted the Lecomte De Watine is the common source. November 6, 1851, Lecomte De Watine sold to E. T. De Curzen a part of the De Luna survey. The calls in the deed begin: "At the corner on the Medina River which is the terminus of the line separating my ranch from the property of Dn. Domingo Losoya; thence run-

ning down said river so as to include all of the low ground or bottom-land which fronts on said river at that place; thence running back a line parallel with the said before-mentioned line, so as to contain within said lines the quantity of four hundred acres." The Losoya grant is immediately west of the De Luna, and the corner on the Medina called for in the above deed is the common corner of the two grants. The field-notes and boundaries of the Losoya are not given.

The controversy in the case is concerning the location of the east line of the four-hundred-acre survey described in the deed from Lecomte De Watine to De Curzen. Gustave Toudouze holds under De Curzen by deed that conveys the same land described in the deed to De Curzen. The common line between the De Luna and Losoya grants runs back from the Medina River in a southwesterly course about one fifth the distance of the common line; then for a short distance turns and runs in a southeasterly direction. Then the line — that is, about four fifths of the common line of the two grants — runs back in a southerly direction to the back line of the grants. It will be seen from this that the common line between the Losoya and the De Luna runs back from the Medina River in an irregular course. The contention of the appellants is, that the parallel line called for in the De Curzen deed should run parallel with the short irregular line of the common line between the Losoya and De Luna grants. Appellees contend that the parallel line called for in the deed should run, not parallel with the short irregular lines, but should run parallel with the main or long common line between the two grants. Appellees further claim that in order to get all the bottom or low ground which fronts on the river as called for in the deed the line must run as they claim it, and claim that they and appellants, by a verbal agreement, fixed the line between them about in the position as claimed by appellees. This agreement was made in 1884. Appellants claim that long previous to the bringing of suit they were in possession of the lands, and are entitled to hold the same by limitation.

Appellants contend that the court erred in refusing to give charges requested by appellants presenting the issues of limitation, and in refusing to inform the jury as to the legal effect of the calls in the De Curzen deed as determining where and how the parallel line should run; and erred in leaving it to the jury to ascertain what was meant by "parallel lines," as stated

in the deed; and also erred in refusing, upon request of appellants, to charge that the call for quantity in the De Curzen deed was the controlling call.

The court, in its charge, submitted the issues of agreed boundary, and the question of boundary as raised by the reference to the calls in the deeds offered in evidence, and permitted them to look to the deeds and maps in evidence, and the circumstances, to ascertain the boundaries of the lands conveyed; and further instructed them that if the land conveyed to De Curzen was four hundred acres, to run in parallel lines with the Losoya and De Luna grants, to find for the plaintiffs. The court refused to charge on limitation.

We think the court properly left it to the jury to ascertain what land was intended to be included in the calls of the deeds. It appears that the appellants were in possession of some of the land in controversy such length of time as would create a bar under the ten years statute of limitation. But in looking to the evidence, we cannot determine with certainty as to what portion of the lands their possession relates. If they seek protection under the statute, the burden is on them to fix the extent of their possession. The three and five years statutes of limitation, under the facts of this case, could have no application.

There are other assignments that complain that errors were committed upon the trial in the rejection and admission of testimony. The questions raised by these assignments, and those of the refusal of the court to give the charge in the particulars that we have considered, are deemed by us unnecessary of consideration in disposing of this case. If the court did, in any of the particulars complained of in these assignments, commit errors, as we conclude that the verdict of the jury on the issue of agreed boundary is supported by the evidence and that it must stand, then these errors are harmless, and would not result in any injury to the appellants. If the court had given the charge requested by appellants, and had agreed with them in the admission and exclusion of evidence, no phase of the case would have thereby been presented that would have likely influenced the jury to reach a different result than their finding in appellees' favor as to the agreed boundary. If the action of the court in the particulars complained of are errors, they are simply so in the abstract, and could not have affected the result: *Beauchamp v. International*

*etc. Ry Co.*, 56 Tex. 243; *Hussey v. Mosser*, 70 Tex. 45; *Smith v. Traders' Nat. Bank*, 74 Tex. 457.

Admit that the issues raised by the refused charges and the excluded evidence were proper to be submitted to the jury, and that they could have regarded the facts and issues thereby presented as proved, still the finding of the jury on the question of agreed boundary may be perfectly consistent with the truth of such facts, and permitted to stand. Suppose that the rejected evidence tended to prove the location of the line where claimed by appellant as he contends, and according to the field-notes; suppose the evidence tended to prove the issues raised by the plea of the ten years limitation, or any other statutory period of limitation, leaving the line unsettled; suppose the evidence in the record tended to establish the line as claimed by appellants, and that the call of the De Cursen deed is entitled to the construction they place upon it;—the existence of all these facts would not preclude the existence of the agreed boundary. They may all be true, and the agreed boundary exist as found by the jury.

This brings us to the consideration of the facts with reference to the agreed boundary. Witness Locke, county surveyor of Bexar County, testifies that about March 21, 1884, Leon Lecomte, one of the plaintiffs, requested him to run a division line between him and Toudouze. He at first declined to do so, because, as he told Lecomte, there had been a row between Lecomte and Toudouze, and they had refused to let his deputy run the line. Whereupon Lecomte replied that they had agreed among themselves, and they simply wanted Locke to go down and run the line, and handed to witness a note to this effect from Toudouze. Locke went out in a few days to run the line, and found Lecomte and Toudouze at the house of the latter. They stated to the witness that they had settled all their differences, and had agreed on how he should run the line. They went out to run the line, and he started to begin at a point lower down the river than a certain pecan-tree; whereupon Lecomte showed him a certain tree to commence from, and he ran from that tree parallel with the main line of the De Luna survey to where it intersected the Corpus Christi road. To continue on this line would have taken some of Lecomte's improvements. The parties then told him that they had agreed to run around the improvements, and he ran the line so as to leave Lecomte his improvements. They all appeared to be perfectly satisfied, and when he set the last peg.

at the end of the line, he asked both Lecomte and Toudouze if they were satisfied with the line as run, and they replied, Yes. When the witness was surveying the line, the parties showed him where they agreed to put the line, and he ran it as directed.

Witnesses De Heimel and Neilly and defendant Gustave Toudouze testified the same in substance as witness Locke as to the agreed line. Toudouze further testified that a few days before Locke made the survey, Octavia Lecomte (plaintiff) came to his house and requested him to go with her to her house and have an agreement with her husband and herself, settling all differences between them about the boundary line. He agreed to go, and as they walked along to her house they passed across the land in dispute, and she said: "Father, we have determined to give you back your land, but you see we have made improvements on some across the Corpus Christi road, and it will be hard on us to lose them." "I told her we would run the line from the river until it reached the road, and then we would turn the line along the road so as to leave them their improvements. She said this was perfectly satisfactory, and thanked me for the concession. When we arrived at the house, we had a talk with Leon Lecomte, and there agreed upon how the line should be run, without, however, at that time going over the line, and agreed that we would at once send for Locke to come out and survey and mark it out. I proposed to send my son for him, and Lecomte said, No, he would go, but that I had also better send a note so Locke would be sure to come. Lecomte wrote the note for me, and carried it to Locke. In a few days Locke came out and ran the line, as testified to by him, so as to leave the Lecomtes their improvements [as he and witness had agreed] with them. Lecomte was along when the line was being run, and agreed to it, and they both expressed themselves as satisfied. In a few days Lecomte moved his fence back from the land in dispute, and put it along the Corpus Christi road, on the line as surveyed by Locke to where the survey stopped." Witness at once built his fence along the line agreed upon, from the river to the Corpus Christi road. While he was building the fence, the plaintiffs were both at home, and knew what was going on, and made no objection.

This agreement was made in March, 1884, and the fences remained as they were put by the parties immediately after the agreement, and it seems from the evidence the land re-

mained in possession of each party respectively up to the fence. The suit was brought about eighteen months after the agreement.

Appellants contend that this evidence is not sufficient to establish an agreed boundary between the parties, because the land in controversy is the separate property of Mrs. Lecomte, and that the husband, Leon Lecomte, had no legal authority to make any agreement with reference to the boundary that would conclude her, unless it is shown that she acquiesced in the line agreed upon; and contend that the facts do not show an acquiescence upon her part in the line agreed upon. Appellants also asked a charge to this effect, which was refused.

In our opinion, this presents the important question in the case. It cannot be contended that the facts do not show an agreed boundary, because the facts in the record tending to establish such agreement are more conclusive and certain in their force and effect than are usually found in cases of this character, where the courts in passing upon the question have repeatedly held the facts sufficient to prove the agreed line. An oral agreement between adjoining owners establishing a dividing line between their lands and a parol partition of lands are held not to be prohibited by the statute of frauds, nor are they within the meaning of the provisions of the law that regulate the manner of conveying real estate: *Aycock v. Kimbrough*, 71 Tex. 333; 10 Am. St. Rep. 745; *Wardlow v. Miller*, 69 Tex. 398; *Cooper v. Austin*, 58 Tex. 496; *Stuart v. Baker*, 17 Tex. 420; *George v. Thomas*, 16 Tex. 89; 67 Am. Dec. 612; *Houston v. Sneed*, 15 Tex. 309. The reason of this rule evidently is based upon the idea that the parties do not undertake to acquire and pass the title to real estate, as must be done by written contract or conveyance; but they simply, by agreement, fix and determine the situation and location of the thing that they already own, the purpose being simply by something agreed upon to identify their several holdings, and make certain that which they regarded as uncertain. In ascertaining the effect of these parol agreements establishing boundary lines, we do not understand that it is necessary in order to give the agreement vitality that it should be supported by acquiescence or acts from which an estoppel may spring; for if the agreement is made under circumstances free of facts that would authorize a court of equity to set it aside, it must stand, although the parties may have been mistaken in their belief that the line agreed upon approximates the line of the



survey where it is really found to exist: *Cooper v. Austin*, 58 Tex. 496.

It is unnecessary for us in this case to express an opinion concerning the validity and effect of a parol agreement made by the husband alone without the consent of the wife, as affecting her separate property. Some of the cases previously cited seem to recognize his power in this respect to so bind her. The evidence in this case satisfies us that the plaintiff Mrs. Lecomte was a party to the agreed boundary, and fully understood its location, and expressed her consent to its establishment. The evidence of her father, Toudouze, connecting her with the agreement, is not denied by her.

We report the case for affirmance.

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**ADVERSE POSSESSION — BURDEN OF PROOF.** — When the statute of limitations is relied upon to resist the right of the true owner of land, the party relying upon it must show by clear proof his actual occupancy, continued, uninterrupted, and adverse, for the time required by the statute: *Irvine v. McKee*, 5 Humph. 554; 42 Am. Dec. 468. Adverse possession cannot be made out by inference, but must be by clear and positive proof; every presumption is in favor of possession in subordination to the rightful owner: *Schwallbach v. Chicago etc. R'y Co.*, 69 Wis. 292; 2 Am. St. Rep. 740, and note; *Smith v. Hosmer*, 7 N. H. 436; 23 Am. Dec. 354. The burden is upon the defendant to establish the defense of adverse possession under color of title: *Bryan v. Spivey*, 109 N. C. 57; *Ruffin v. Overby*, 105 N. C. 78.

**BOUNDARY BY PAROL AGREEMENT — STATUTE OF FRAUDS.** — When adjoining proprietors agree upon a permanent boundary line, and take possession accordingly, the agreement binds them and those claiming under them. Such an agreement is not within the statute of frauds: *Krider v. Milner*, 90 Mo. 145; 17 Am. St. Rep. 549, and note; note to *Johnson v. Archibald*, 22 Am. St. Rep. 35, in which is discussed the question of acquiescence in parol agreements fixing boundaries, amounting to estoppel.

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## COLLINS v. BALL.

[32 TEXAS, 259.]

**EVIDENCE — PROBATE SALES — RECORD AS EVIDENCE OF LAND SOLD.** — The record of a probate court, showing the sale of land described only as the "S. Burks survey," is inadmissible in an action of trespass to try title to show title to another and distinct tract of land known as the "S. Banks survey"; nor is parol evidence that the land sold was appraised, advertised, and auctioned as the "Banks survey" admissible in such case to show that such survey was intended to be sold, and to thus contradict the record of the probate court.

**EVIDENCE — RECORD OF PROBATE SALE — EVIDENCE TO EXPLAIN.** — Where there are conflicting descriptions of the land sold in a probate record, or

a latent ambiguity therein, the order of sale, or the whole or any part of the record, may be aided by reference to the inventory of the estate, or by extrinsic evidence, in order to indentify the land sold, but in the absence of such conflicting descriptions or latent ambiguity, other land than that which is clearly described in such record cannot be ingrafted therein by extrinsic evidence, for the purpose of showing that it was in fact the land intended to be conveyed.

**IDEM SONANS.** — The words "Burks" and "Banks" are neither *idem sonans* nor the same name. Parol evidence that land conveyed as being that of "Burks" was in fact that of "Banks" is inadmissible, in the absence of misdescription or latent ambiguity.

**EVIDENCE OF LOST PROBATE INVENTORY.** — Where the original inventory is recorded, it becomes a record of the probate court, and when the original is lost, a certified copy is the best evidence with which to prove its contents, but parol evidence is not admissible for that purpose.

**EVIDENCE — INTERLINEATIONS IN PROBATE DEED.** — Interlineations in an administrator's deed offered in evidence are presumed to have been made before signing only when the deed and its surrounding circumstances are free from suspicion; and if such conditions do not exist, the deed is not admissible in evidence without satisfactory explanation.

**EVIDENCE — COMPARISON OF HANDWRITING TO SHOW MISTAKE IN DEED.** — Where the original inventory of an administrator is lost, letters written by the man who wrote it are not admissible to show an alleged mistake in the administrator's deed, for the reason that there can be no comparison of the handwriting.

*D. A. Nunn, Alexander and Winters, and M. Surratt, for the appellants.*

*James A. Harrison, for the appellees.*

**MARR, J., Section A.** This case was before this court heretofore, and the opinion then rendered and adopted by the supreme court will be found reported in 5 S. W. Rep. 622. The respective claims of the parties in the suit are correctly outlined in the former opinion, as well as the subject-matter of the controversy. The judgment in favor of the present appellant Collins, who deraigns title to the land in dispute under C. E. Douglas, administrator *de bonis non* of the estate of D. O. Warren, deceased, was then reversed because the record upon the appeal disclosed no order of the court authorizing the administrator to make the sale. That was the sole question decided upon the former appeal, and the decision was rested mainly upon the provisions of the Revised Statutes. Upon the last trial this defect in the title of Mrs. Collins was supplied by the introduction of the proper decree of the probate court and the other proceedings, authorizing and confirming the sale of the land, as well as the deed thereto. These proceedings are conceded by the parties to be regular and valid upon this appeal.

**The judgment and verdict in the court below were rendered, however, in favor of appellees Ball, Hutchings, & Co. upon the last trial, and Mrs. Collins and M. Surratt have appealed. The trial below occurred on April 25, 1890.**

The land in dispute is "the D. O. Warren one-half undivided interest in a survey of land situated in McLennan and Coryell counties, patented to D. O. and John W. Warren, assignees of Salitha Banks, containing 18,345,902 square varas." Before the administration of Douglas, W. H. Warren had been administrator of the estate of D. O. Warren, and under him both the appellees and the appellant Surratt claim title to the land. The deeds of Surratt are junior to those under which Ball, Hutchings, & Co. attempted to deraign title, and both are older than the proceedings by which the land was conveyed to the plaintiff Collins. In our estimate of the record, as well as on account of the statements of counsel who argued the case before us orally, we think that it will not be necessary to a proper disposition of the present appeal to determine the controversies appearing in the record between Surratt and Ball, Hutchings, & Co. They both claim under the first probate proceedings, and a sale in virtue thereof to John W. Warren by W. H. Warren, as administrator of the estate of D. O. Warren, deceased. If the legal effect of these proceedings, together with the deed from W. H., as administrator, to John W. Warren, was to convey the land in dispute to the latter, and thus divested the estate of the title to the land, it would follow that these proceedings must prevail over the later title of the plaintiff, otherwise her title should be recognized as the superior. The appellant contends that the original proceedings in the county court of Leon County, where the administration was pending, show clearly and distinctly that the land in controversy was not sold or conveyed to John W. Warren, but on the contrary, that instead of the "S. Banks survey," it was the "S. Burks survey"—entirely different land—which was ordered to be sold, and in fact was sold, to said Warren, and that parol evidence is not admissible in such state of the record.

To further illustrate the points at issue, we will insert the statement made by appellants' counsel under the second assignment of error, which, as to matters of fact, is not disputed, and which we find to be supported by the record. It is as follows:—

"D. O. Warren died in Leon County in 1869, and his estate was administered by his son W. H. Warren, who was duly

appointed and qualified. W. H. Warren filed an inventory. This inventory does not contain any allusion whatever to the land in controversy, but it does contain mention of the S. Burks one third league in McLennan County. The original inventory is shown to have been lost or abstracted.

"But it is proved by the clerk of the court and one other witness (plaintiff's attorney) that the original inventory did not contain the S. Banks survey, and that it was correctly copied in that respect upon the record. A careful comparison was made by these witnesses of the original with the record of the same. This inventory is shown by a certified copy taken while the original inventory was in the office, and was the same read in evidence by the defendants Ball, Hutchings, & Co.

"The report of sale was never lost; it is in the office yet; and this report made of a sale, under which appellees claim, does not mention the S. Banks survey, but it does mention an S. Burks one third of a league in McLennan County. The only matters of description contained in the report of sale are, — 1. The name; 2. The amount of the land; 3. The locality. In neither of these three particulars is the land in controversy described: 1. The name is essentially different; 2. The quality and character of the estate sold is different; 3. The locality is different, — about one half the land in controversy is in Coryell County, and only one half in McLennan County.

"Fourteen hundred and seventy-six acres in McLennan County, S. Burks headright, does not describe undivided half of 18,845,902 square varas (about 3,249 acres) in McLennan and Coryell counties. The order of court confirms only the sale as reported, and makes no allusion or reference to any other paper or record for description or otherwise.

"The defendants were allowed, over objections, to introduce evidence to the effect that the sale was advertised of the Banks, and not Burks; that it was cried and called the Banks when being auctioned off, and that one of the appraisers thought it was put on the appraisement as Banks; that it was called Banks in the talk at time of appraisement; but the deed they offer in evidence from W. H. Warren, administrator, of date December 1, 1870, proved for record the 13th of February, 1871, but not recorded till the 13th of April, 1874, the original of which we herewith present to the court, shows that this land was described as 1,476 acres S. Burks headright, situated in McLennan County, and thereafter interlined and changed with paler ink, whereby Burks is converted into

**Banks, and Coryell County is inserted, and an "s" added to county, so as to make it read 'McLennan and Coryell countys.'**"

The original deed is before us, having been sent up by order of the district court, and the appellant correctly describes its appearance, and the alterations or changes in the terms.

The first assignment of error is, that "the court erred in admitting the certified copy of the inventory of W. H. Warren, administrator of D. O. Warren's estate, also report of sale, order of sale, and order of confirmation, because it nowhere appeared that the land in controversy had been inventoried or ordered to be sold, or reported sold or confirmed, and said evidence was misleading and calculated to confuse the jury, and was irrelevant and incompetent to show a sale of the land as claimed by the defendants, as fully shown by plaintiff's bill of exceptions on file." (Submitted as a proposition.)

The third and fourth assignments of error may be disposed of in connection with the foregoing assignment. They are as follows: "The court erred in admitting the evidence of W. D. Wood, B. F. Burroughs, and others, over plaintiff's objections, as to the name of the land cried at the sale, or advertised to be sold, or talked about while making the appraisement, because such evidence was irrelevant and incompetent as affecting the issue of the case, and was calculated to confuse and mislead the jury into the mistaken notion that it was within their province to determine the intentions of the administrator to sell the land in controversy, and thus decide if such intention existed; they could thereby infer that the administrator so reported, and that the court so intended to confirm the sale, and thus overturn and disregard the record of the court made in such administration, as fully shown by bill of exceptions on file." (Treated as a proposition.) And also, "in admitting, over the plaintiff's objections, the testimony of W. A. Cassaday, that there is no survey of land in McLennan County in the name of S. Burks," because the record could not be changed or contradicted by parol, and the records are the best evidence of what land was sold, etc.

The action is one of trespass to try title, and was instituted by Mrs. Collins on July 8, 1882. All of the proceedings of the probate court which eventuated in the sale of the land to J. W. Warren described it as the S. Burks or "S. Burks headright." The report of sale so described it, and the probate court simply declared that the report was "examined, confirmed, and

approved," etc., without any description of the land. None of the proceedings refer to the patent, or any record or other writing, for the purpose of the identification of the land.

The power of the administrator to convey the land of an intestate is derived from the court: *Ball v. Collins*, Tex., Nov. 1887; 5 S. W. Rep. 622. He can convey only that which the probate court has, in the manner prescribed by law, authorized him to convey. We do not doubt that in a proper case the order of sale or other parts of the record might be aided by reference to the inventory, or that the whole record, in reference to the sale or any part thereof, might be looked to in case of uncertain or conflicting descriptions of the land in the record, in order to identify the property thereby conveyed. Likewise, in case of latent ambiguity, where the proceedings refer to other records, deeds, or writings, etc., resort could then be had to such extrinsic evidence: *Hurley v. Barnard*, 48 Tex. 88; *Davis v. Touchstone*, 45 Tex. 490; *Lindsay v. Jaffray*, 55 Tex. 642. But in the present instance these rules do not apply. Here is neither a latent nor a patent ambiguity. There is a total misdescription of the land in dispute; and other distinct land, so far as the record of the proceedings disclose, is plainly described. In such case we can only arrive at what the court intended by what the court did, as manifested by its own records. To give effect to a supposed intention of the court, wholly unexpressed in any of the proceedings, would be not only to contradict the records, but in effect to pass the title to the land by parol. Other land than which is clearly described in the proceedings cannot be ingrafted into these records for the purpose of showing that it was in fact the land intended to be sold: *Watts v. Howard*, 77 Tex. 71. The proceedings in the probate court were therefore irrelevant, and did not support the deed of the administrator to John W. Warren, because they do not describe the land in controversy at all, or anywhere, unless "Burks" and "Banks" are the same name. They plainly are not, neither are they *idem sonans* any more than "Burkhead" and "Bankhead": *Anthony v. Taylor*, 68 Tex. 405. But the appellee contends that as the original inventory has been "lost or abstracted," parol evidence should be admitted to prove the contents of the original. He introduced a certified copy, from the minutes of the probate court, of the inventory, which was duly certified to by the clerk as "a true and correct copy," etc., on the twenty-seventh day of November, 1882. This copy, like all of the proceedings, as

well as the testimony of the clerk as to the contents of the original, describes the land as Burks, not Banks. The appellee offered no "examined copy" of the original inventory, even if that would have been admissible, which, however, we are not required to decide: *Lanier v. Perryman*, 59 Tex. 104.

The inventory of the property of the estate of a decedent is required by law to be recorded in the minutes of the probate court, and when so recorded becomes a record of the court: Rev. Stats., arts. 1795, 1799, 1918. The manifest purpose of the law in requiring a record to be made of this or other proceedings in the county court in reference to an estate is to preserve in a permanent form evidence of the originals, in case they should be lost or destroyed. Certified copies of such records are admissible under the statute, "where the records themselves would be admissible": Rev. Stats., art. 2252. Certainly, therefore, when the original document is lost, the record or a copy therefrom would be the next best evidence of the contents of the original, and the best evidence of which the case is susceptible ought always to be offered, to the exclusion of all other of a weaker and less certain character: *Williams v. Davis*, 56 Tex. 250; *Allen v. Read*, 66 Tex. 19.

If the original could be produced, and was found to conflict with the record as made by the clerk, it would, perhaps, control, and could be used to correct any clerical mistakes made in recording it; but to allow such corrections or contradictions of the record to be made by the mouths of witnesses would contravene many well-settled rules of evidence. The law does not contemplate that the intention or proceedings of a court of record, or the evidence of title to land derived through a judicial sale, shall be hidden in the minds of men, or depend solely upon their fallible memories. In an opinion delivered by this court, and adopted by the supreme court, it was held that where the original inventory was lost, a certified copy from the record was the best evidence of its contents, and that parol evidence was not admissible. This was a determination of the precise point in hand, and adversely to appellees: *Roberts v. Connelley*, 71 Tex. 11. We have only gone into this subject because counsel have discussed it as if it were still an open question so far as the exact point is concerned.

We conclude that the court erred, for the reasons already given, in admitting in evidence the proceedings of the probate court mentioned in the first assignment of error, and in not excluding the testimony of "W. D. Wood, B. F. Burroughs,



and others," etc. For similar reasons, the evidence of W. A. Cassaday, before adverted to, was inadmissible in this case. Proof that there was no survey in the name of S. Burks in McLennan County did not show that the S. Banks survey had been sold, in the face of the records of the probate court to the contrary.

The fourteenth assignment of error is to the effect that "the court erred in admitting, over objections of plaintiff, the deed of W. H. Warren, administrator, to John W. Warren, because of interlineations and material changes," etc. We have already stated the appearance of the deed and the interlineations. The appellant contends for the following proposition of law under this assignment, viz.: "The rule that interlineations in a deed offered in evidence are presumed to have been made before signing does not apply except when the deed and its surrounding circumstances are free from suspicion; and if such conditions do not exist, the deed cannot be admitted without satisfactory explanation."

We think that this is a correct statement of the law under the facts of this case, and in view of the conflict in the terms of the deed as altered, with the description of the land as given in the probate record and proceedings. Without explanation of the changes in the terms of the deed, it ought to have been excluded: *Park v. Glover*, 23 Tex. 470; *Dewees v. Bluntzer*, 70 Tex. 406; *Harper v. Stroud*, 41 Tex. 872.

The plaintiff's counsel asked the following instructions to the jury, among others, viz.: —

"1. That the record shown by the C. E. Douglas administration entitled plaintiff to recover, and that the record of the W. H. Warren administration failed to show title to have passed to appellees.

"8. That by the uncontradicted evidence of the case, the administrator, W. H. Warren, reported the sale of the S. Burks survey, and the probate court of Leon County confirmed the sale as reported, and in no other way, as shown by the certified copy of the decree; therefore no title passed of the Salitha Banks survey, and the land remained a part of the D. O. Warren estate, and that the probate proceedings of the sale by C. E. Douglas, being in all respects regular, had the effect to pass the title to plaintiff.

"These charges were all refused. The C. E. Douglas administration is shown to be complete in every respect."

The plaintiff assigns as error the action of the court in re-

sisting to allow these charges. We think that they ought to have been given. It was the duty of the court to construe the records and proceedings of the probate court which have been introduced in evidence, and to declare their legal effect to the jury.

The effect in law of the proceedings in the probate court of Leon County, under which Ball, Hutchings, & Co. claim, was, as we have already held, to convey (if anything) the S. Burks survey, which is not the land in controversy. The parol testimony offered by appellees, as we have also seen, could not change this result, nor alter nor contradict the records and proceedings in the probate court. The appellees, therefore, in legal contemplation, were left to depend entirely upon the administrator's deed in support of the sale to John W. Warren. The deed became as a conveyance insufficient and void for want of power in the administrator to convey land not ordered to be sold or conveyed by the probate court, and the sale of which had not been confirmed by that court. This state of the case entitled appellant Collins to an instruction to the jury to find a verdict in her favor.

Other matters in the rulings of the court below complained of as error by the plaintiff's counsel will not likely occur again upon another trial.

The appellees present a cross-assignment of error to the exclusion of certain letters written by one Barnes, deceased, who it is claimed wrote the original inventory, in order by comparison to show that the name was really written Burks, as the writer was in the habit of making an "a" like "u" and an "n" like "r." As the original inventory was not produced, there could be no comparison of the handwritings, etc. The court correctly excluded this testimony for this reason, and for other reasons already given under the third and fourth assignments.

We think that on account of the errors before indicated the judgment should be reversed and the cause remanded.

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**EXECUTION SALES.** — A fatally defective description in a sale on execution cannot be helped out by evidence of facts tending to prove what property the officer probably intended to advertise and sell: *Herrick v. Morrill*, 37 Minn. 260; 5 Am. St. Rep. 841. See also notes to *Hoffman v. Anthony*, 75 Am. Dec. 705, and *De Sepulveda v. Baugh*, 5 Am. St. Rep. 455.

**PAROL EVIDENCE, WHEN ADMISSIBLE** to explain an ambiguity, latent or patent: *Shore v. Miller*, 80 Ga. 93; 12 Am. St. Rep. 239, and note. According to the more usual rule, the admissibility of such evidence is confined to cases of latent ambiguity: *Houston v. Bryan*, 78 Ga. 181; 6 Am. St. Rep. 252, and note.

**IDEM SONANS:** See note to *State v. White*, ante, p. 783.

**EVIDENCE.** — **TRANSCRIPT OF A RECORD** of a probate court is admissible as secondary evidence only upon proof of loss or destruction of original record: *Lipecomb v. Postell*, 38 Miss. 476; 77 Am. Dec. 651, and note. But on account of the inconvenience which would result from the frequent removal of certain public documents, provision has been almost universally made by statute for the admission of certified copies of such documents as competent evidence: *Ocons v. Reneck*, 11 Tex. 134; 60 Am. Dec. 230, and note. Thus a certified copy from the general land-office of a grant of land is evidence of title: *Van Sickle v. Catlett*, 75 Tex. 404. So a copy of a patent of lands, issued by the United States, may be certified by the "acting commissioner" of the general land-office, and such certified copy is admissible in evidence without producing or accounting for the original: *Ross v. Goodwin*, 38 Ala. 390. The record of the various papers filed in the course of judicial proceedings is competent evidence when the original files are lost: *Oost v. Bertrum*, 86 Mich. 356. Certified copies, in the cases where they are admissible, are not competent evidence, unless the original, if produced, would be competent: *Donohue v. Whitney*, 133 N. Y. 179.

**MATTERS OF RECORD** cannot be proved by parol evidence: *State v. Dougherty*, 106 Mo. 182.

**WHERE AN INTERLINEATION APPEARS**, and there is no evidence to show when it was made, it will be presumed to have been made before the execution: *Letcher v. Bates*, 6 J. J. Marsh. 524; 22 Am. Dec. 92 (see opinion p. 94), and note. To avoid a deed having an interlineation or erasure apparent on its face, the alteration must be shown to have been made under circumstances that the law does not warrant: *Stewart v. Preston*, 1 Fla. 10; 44 Am. Dec. 621, and note. So in *Wilson v. Hotchkiss*, 81 Mich. 172, it was held that where no suspicion is raised by an inspection of alterations apparent on the face of a deed, they are presumed to have been made before its execution. Other cases hold that the presumption is against the validity of a deed with any material alteration on its face: *Pipes v. Hardesty*, 9 La. Ann. 152; 61 Am. Dec. 202. To the same effect is *Simpkins v. Windsor*, 21 Or. 382.

**COMPARISON OF HANDWRITING.** — The proof of the genuineness of a paper by comparison of handwriting is discussed in *Travis v. Brown*, 43 Pa. St. 9; 32 Am. Dec. 540; *State v. Thompson*, 30 Me. 194; 6 Am. St. Rep. 172; *Wilson v. Van Leer*, 127 Pa. St. 371; 14 Am. St. Rep. 354, and note. See also note to *Fuller v. Fox*, 9 Am. St. Rep. 29.

## MATKIN v. SUPREME LODGE OF KNIGHTS OF HONOR.

[32 TEXAS, 301.]

**LIFE INSURANCE — BENEFIT SOCIETY — INITIATION NECESSARY TO MEMBERSHIP AND BENEFIT PRIVILEGES.** — Where it appears from the constitution and by-laws of a secret order or benefit society which insures the life of its members that initiation is indispensable to membership, and that it is only upon the death of a member that his beneficiary is entitled to receive his insurance, the facts that a person's application for membership has been accepted, and his "proposition fee" paid, will not entitle his beneficiary to any insurance in the event of his death before he has been initiated as a member of the society.

**LIFE INSURANCE—BENEFIT ASSOCIATIONS—REGULATION MAKING INITIATION NECESSARY TO MEMBERSHIP.**—A by-law of a secret order or association which insures the lives of its members, making initiation necessary to membership and the enjoyments of the benefit attaching thereto, is reasonable, and calculated to promote the objects and welfare of the order or association, and is not void as being unreasonable, or opposed to law or public policy.

*Charles C. Leverett, for the appellant.*

**COLLARD, J., Section A.** This suit was brought by Lucy Matkin, widow of W. T. Makin, against the Supreme Lodge of the Knights of Honor, for two thousand dollars insurance. It is claimed by appellant that W. T. Matkin at the time of his death was a full-rate member of the Bellview subordinate lodge No. 1958, and that as such his wife is entitled as his beneficiary to the amount sued for, the constitution of the order providing that upon the death of every full-rate member the supreme lodge shall pay to the beneficiary two thousand dollars.

Defendant claims that Matkin was not a member of the order, having died before he was initiated.

He made his application for membership in the Bellview subordinate lodge on April 19, 1888. On May 10th, in accordance with the regulations of the order, he was examined by the lodge medical examiner and recommended to membership, and on May 14th the state medical examiner approved the examination. The lodge donated to him the proposition fee, or fee required to be paid for entertaining his application. The fee was the property of the subordinate lodge, and they could donate it. All forms were complied with, and on June 7th he was duly balloted for and elected by the lodge to membership. After such election the laws require the reporter of the lodge, within seven days thereafter, to notify the applicant of his election, and should the applicant fail to present himself for initiation within four stated meetings of the lodge after notification (unless by sickness or other unavoidable occurrence), the applicant forfeits his proposition fee and election. Matkin was sick when elected, and died on the 9th of June, 1888, two days after his election. He never presented himself for initiation; he had offered to pay the one dollar fee for his benefit certificate from the supreme lodge, but the certificate, under the constitution, was to be issued on application of the subordinate lodge to the supreme lodge, after the applicant had received the degree.

The application for membership to the subordinate lodge, as made by Matkin, among other stipulations, binds the applicant to obey and comply with the constitution and laws of the order. It also contains the following clause: "I further agree and contract that the payment of the proposition fee, or the entertaining of this application, unless I am duly elected and initiated according to the ritual and laws of the order, does not and shall not constitute membership, or give me any of the rights of a member." The court below, trying the case without a jury, decided that as deceased was never initiated he was not a member of the order, and that without having attained membership his widow designated as his beneficiary could not recover, and judgment was entered accordingly.

She has appealed, and asks that the judgment be reversed, because the evidence shows that the contract was complete; that the deceased was in legal contemplation a member of the order; that it was not shown that initiation was a reasonable requirement and a necessary part of the contract; that the right to membership was not shown to depend upon a ceremony of initiation; and because the court erred in its conclusion of law, because the terms of the contract had been fully agreed upon independent of the act of initiation, the deceased having been duly elected a member of the lodge.

There is really but one question in the case: Was Matkin an insured member of the order? Or, stated differently, was the contract of insurance complete and binding on the defendant? Appellant's brief cites us to several cases as favoring the affirmative of these propositions, as follows: *Kentucky Mut. Ins. Co. v. Jenks*, 5 Ind. 96, where there was an application for life insurance, accepted by the company and policy issued October 2, 1850, which was sent to the agent and received by him October 5, 1850. The insured had taken sick on the 29th of September, and lingered until October 4, when he died. The agent returned the policy to the company. The company had accepted first premium in advertising in applicant's newspaper for six months. It was held that the contract was complete at least on October 2, when it was approved and the policy mailed to the agent. In another case cited, it was held that where the terms of fire insurance are accepted, but the policy is not issued as it should have been, because the day on which it was to issue was a legal holiday, the agreement to issue the policy was binding: *Commercial etc. Ins. Co. v. Union Mut. Ins. Co.*, 19 How. 318.

Where the terms of insurance against loss by fire were made known by letter of the company and accepted by the insured, it was held that the contract was complete when he placed the letter of acceptance in the post-office, the house having burned down while the letter was in progress by mail: *Taylor v. Merchants' Fire Ins. Co.*, 9 How. 390. The transmission of a check by mail was held to be sufficient payment, the agent having so instructed the applicant.

Where the premium was sent with a proposal for insurance, with an understanding that if the company refused to accept the premium was to be returned, and the proposal was accepted and policy sent to the agent to be executed by him, which he did, but refused to deliver, the insured being sick at the time and dying soon after, the refusal based upon private instructions from the company, it was held that the contract and acceptance were unqualified, and could not be limited by such instructions: *Fried v. Royal Ins. Co.*, 47 Barb. 127.

These cases establish a familiar doctrine, and many more might be cited in support of it, but they are not applicable to the facts of the case before us.

Appellant refers us to the case of *Schunck v. Gegenseitiger etc. Fond*, 44 Wis. 370. The deceased member of a subordinate lodge had paid all dues to the same, and upon his death the supreme lodge refused to pay the insurance, because the subordinate lodge had failed to forward the same to the supreme lodge as required. It was held that there was no forfeiture, the deceased being in good standing with the lodge at the time of his death.

In the case before us we have to deal with entirely different questions. We do not think that Matkin had acquired any rights of membership in the lodge to which he applied, because he had never become a member; he had nothing to forfeit. He had only acquired the right to become a member by initiation. It is clear from the constitution and by-laws of the order of the Knights of Honor offered in evidence that initiation was indispensable to membership, and without it he had no contract binding the defendant to allow him to participate in its benefit fund or to exercise other privileges of a member. His election to membership did not confer upon him such rights. He was required by section 6 of article 6 of the by-laws to present himself to receive the degree within six weeks from the time of his election, and upon failure to do so, upon objection being made to his subsequent initiation,

a new ballot was to be ordered. By section 1 of article 7 of the by-laws, the payment of dues is made to commence with the date of receiving the degree. It was only upon the death of "a member who has attained the degree of the subordinate lodge" that the supreme lodge could order payment to the beneficiary. This is shown by the constitution, article 7, section 7, and article 8, section 4.

The objects of this order, as stated in the constitution, are not merely to establish a fund for purposes of insurance of members "who have complied with all its lawful requirements," as stated in article 1, section 4, of the constitution, but as also declared in the same article and section, "to unite fraternally all acceptable white men of every profession, business, and occupation," and "to give all possible moral and material aid in its power to its members and those depending on its members, by holding moral, instructive, and scientific lectures, by encouraging each other in other business, and by assisting each other in obtaining employment." With these and other beneficial objects in view, it is not difficult to see why there should be a regular initiation into the order, and why members only can participate in its benefits; that the ceremony of initiation is secret does not affect it; it is doubtless intended to bind the members to a performance of their duties in respect to the objects to be accomplished. We could not say that it is a useless and unreasonable requirement. The affiliation is close and confidential, for good purposes so far as can be seen from the testimony. Were the ceremonies open they could not be said to be unreasonable; because they are secret does not make them so. The entire system, its existence and objects, are based upon initiation. We think there can be no membership without it, and no benefit, pecuniary or otherwise, without it.

Matkin specially contradicted in his application for membership, with reference to initiation, that the payment of the "proposition fee" should not entitle him to any benefit, or constitute him a member, unless he was duly "initiated according to the ritual and laws of the order." We have not been cited to any case like the one before us, and we have not been able to find any. There are many cases where the courts have interfered with the rulings of such organizations, declaring what was a reasonable or unreasonable regulation, but none that we are aware of directly in point. For instance, where an association enforced a by-law making it an offense for one



member to "vilify" another, expelling the member, "the court reinstated the member upon the ground that such a law was not necessary for the good government and support of the corporation": *Commonwealth v. St. Patrick Ben. Soc.*, 2 Binney, 448; 4 Am. Dec. 453. A by-law imposing excessive dues was held to be invalid: *Pulford v. Fire Department of Detroit*, 31 Mich. 458; *Hibernia Fire Engine Co. v. Commonwealth*, 98 Pa. St. 264. In the last case cited it is held that the court will not interfere unless the unreasonableness shall be clearly shown: See the above and other cases in 2 Am. & Eng. Ency. of Law, 173, and note 8.

The stipulation in Matkin's contract, and in the laws of the order making initiation necessary to membership and the enjoyments of the benefits attaching thereto, is not against law or public policy, unreasonable, nor opposed to the good government and objects of the society. On the contrary, it is reasonable, and calculated to promote the objects and welfare of the order.

We conclude that there was no error in the conclusions and judgment of the lower court in so holding, and that the judgment should be affirmed.

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**BENEFIT ASSOCIATIONS — BINDING EFFECT OF BY-LAWS.** — The decision of the tribunals of a benefit association upon the rights of persons presenting death claims may be made final by its laws, and if so made, in the absence of proof that the association acted fraudulently or contrary to such laws, the courts will not interfere: *Cassfield v. Great Camp etc.*, 87 Mich. 626; 24 Am. St. Rep. 186, and note. See extended note to *Bankers' etc. Ass'n v. Stapp*, 19 Am. St. Rep. 781.

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## **GULF, COLORADO, AND SANTA FE RAILWAY COMPANY v. LOONIE.**

[32 TEXAS, 323.]

**TELEGRAPH COMPANIES — DELAY IN DELIVERY OF TELEGRAM — SPECIAL DAMAGES.** — To authorize a recovery of special damages for delay in the delivery of a message, the telegraph company must have had notice, either from the face of the message or otherwise, at the time of receiving it, of the circumstances out of which special damages might arise.

**TELEGRAPH COMPANIES — DELAY IN DELIVERY OF TELEGRAM — MEASURE OF DAMAGES.** — In an action by a building contractor against a telegraph company for its negligent delay in delivering a message sent by him requesting the forwarding of plans and specifications, with notice to the company that they were wanted to aid him in buying building material, the measure of damages is the amount paid for the telegram, the value

of time lost, and expenses incurred by the delay, and any advances in the price of material within such time as by the use of reasonable diligence the contractor could have had the plans and specifications forwarded to him after discovering the delay.

*J. W. Terry*, for the appellant.

*H. S. Lumpkin*, for the appellee.

GARRETT, P. J., Section B. P. J. Loonie brought this suit against the Gulf, Colorado, and Santa Fé Railway Company and Western Union Telegraph Company to recover damages for negligent delay in the delivery of a telegram. The case was tried by a jury, and after dismissal as to the Western Union Telegraph Company, a verdict was rendered in favor of the plaintiff as follows:—

“We, the jury, find for plaintiff against the Gulf, Colorado, and Santa Fé Railway Company the following amounts, to wit:—

Amount paid for telegram . . . . .	\$0 75
Number of days lost, seven, at \$20 per day . . .	140 00
Amount of expenses and railway fare . . . . .	55 00
Extra costs paid for material . . . . .	350 00

Total . . . . .	\$545 75”
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Upon which verdict judgment was entered. Defendant moved for a new trial, and motion was overruled, and case has been properly appealed.

Plaintiff was at the time the cause of action arose contractor for the building of the Bosque County court-house, in accordance with certain plans and specifications. About July 1, 1886, he started to Chicago to contract for certain material to be used in the construction of said court-house. At the time he had a number of men in his employment, and the house was in the course of construction. He left his brother, James Loonie, in charge of the building, but before he left for Chicago he told W. D. Mathis, the local agent and telegraph operator in defendant's office at Meridian, that he was going north to get the material to finish the court-house; that he had left his brother, James Loonie, in charge of the work and the plans and specifications of the court-house; that he would need the plans and specifications for the manufacturers to see, in order that they could make the required material; that he would telegraph back to his brother James Loonie for them; and that he (Mathis) must deliver all telegrams to James Loonie in plaintiff's absence. Plaintiff telegraphed en route as follows:—

**KIRKWOOD, Mo., July 8, 1888.**

**" TO JAMES LOONIE, Meridian, Bosque County, Texas.**

**" Send me by express to Palmer House, Chicago, front elevation, plans, and entire specifications. All well.**

**" P. J. LOONIE."**

**This telegram was delivered to the operator in charge of the Western Union telegraph office at Kirkwood, Missouri, and seventy-five cents was paid by plaintiff for its transmission. He told the operator that the telegram was important, and to push it through. Plaintiff then accompanied his wife, who was with him, to Elmira, New York, where he left her and went to Chicago. He got to the Palmer House about July 7th. The plans and specifications had not arrived, and he waited for them four days. In another connection he stated that he was there from about the 7th to the 18th of July.**

**In the mean time, plaintiff, who had with him a partial description of the house, and from study of the plans and specifications about knew them, saw the De Borne Manufacturing Company, and explained to them the iron stairs, and the size and dimensions thereof, and they agreed to make them for him; but said they would not enter into a written contract until they could see the plans, elevations, and specifications of the court-house. He saw Palmer, Fuller, & Co., manufacturers, and made a trade with them to furnish the doors, sash, and blinds for the building, but they also refused to begin work until they could get the plans, elevations, and specifications. He saw also and contracted with Ziegler Brothers, hardware men, for the iron and hardware, and explained to them the plans and specifications, and they agreed at a certain price to furnish the hardware. After plaintiff saw that the manufacturers would not commence work until they could get the plans and specifications of the court-house, he returned to Meridian, Texas, and arrived there on July 18th. He found that the telegram had not been delivered, and immediately commenced to trace it. It was ascertained that the telegram had been sent at once by the Western Union Company from Kirkwood, Missouri, to Fort Worth, Texas, and immediately transferred to Meridian, to said W. D. Mathis, local operator for the defendant. The investigation resulted in the delivery of the telegram to James Loonie by W. D. Mathis on July 19th.**

**Plaintiff testified that on account of the failure to receive the plans and specifications while in Chicago he was prevented from carrying out his contracts for the manufacture of the**

material which he needed, and that when he returned to Chicago and contracted for the material in the latter part of August, the persons with whom he had provisionally contracted had sprung on their prices, and forced him to pay, in addition to his first agreement, \$200 for the doors, sash, and blinds, \$150 for the hardware and iron-work, and \$300 for the stairways; which he would not have had to pay if he had received the plans and specifications in time, as the prices had advanced; that he had paid out in cash for railway fare in returning to Meridian and back again \$70; and that he had lost ten days' time, which was worth to him \$50 a day.

Omitting that portion of the charge to which the verdict does not respond, the court instructed the jury as to the measure of damages as follows:—

“1. The amount he. paid to have said message sent to James Loonie, at Meridian, Bosque County, Texas.

“2. The value of the services of plaintiff for any time he may have been compelled to lose by reason of such negligent failure, if any, to deliver said telegram.

“3. If you find that the plaintiff was engaged in constructing the court-house in said Bosque County, as he alleges in his petition, and that it was necessary for him to purchase certain material for the completion of said building, as charged in the petition, and shall further find that he was compelled to pay more for said material on account of the failure to deliver said telegram in due time, as plaintiff alleges, then you will find for plaintiff as damages the difference between the price at which plaintiff could have purchased said material if said telegram had been delivered in reasonable time, and the price, if any, plaintiff was forced to pay for said material by reason of the negligent failure, if any, to deliver said telegram in a reasonable time.”

Appellant requested the following special charge, which was refused: “You are charged that there being no evidence that during the pendency of the transaction concerning the telegram the defendant company had notice of the contracts which the plaintiff testified he made in Chicago for the sash, doors, and blinds, galvanized iron-work and stairways, you should not allow damages on account of the failure of the plaintiff, by the delay in the telegram, to secure the performance of such contracts, and consequently having to pay more than such contract prices for the material or work contracted for.”

The testimony of the plaintiff with reference to his provisional contracts in Chicago for the material was objected to by the defendant, on the ground that "defendant at no time during the pendency of the transaction concerning the telegram, the alleged delay in the delivery of which is the basis of this suit, had notice of the making of the above-mentioned contracts by the plaintiff, and hence the same were not a proper basis for damages in this suit; and further, that the damages claimed on account of said contracts are remote, speculative, and uncertain." A bill of exception was saved to its admission; all of which has been assigned as error by the appellant, who submits this proposition: "To authorize a recovery of special damages for the delay in the delivery of a message, the telegraph company must have had notice, either from the face of the message or otherwise, at the time of receiving it, of the circumstances out of which the special damages might arise. In other words, the fact that such special damages might follow must have been in the reasonable contemplation of the telegraph company at the time of receiving the message."

We think there was no error here. The charge of the court as above quoted submits the correct general rule for the ascertainment of the damages sustained by the plaintiff. They are such as naturally arise from the breach of the contract, or such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract as to the probable result of the breach of it: *Daniel v. Western Union Tel. Co.*, 61 Tex. 456; 48 Am. Rep. 305. It is shown by the evidence that Mathis, the defendant's operator at Meridian, knew of the importance of the telegram, and understood its nature and purpose, and he should have reasonably anticipated that the plaintiff would be waiting in Chicago for the plans and specifications, if he should fail to deliver the telegram, and that his delay would be attended with the loss of time, and a probable advance in the prices of the material which the operator knew plaintiff had gone to purchase.

Plaintiff having gone to Chicago for the purpose of procuring the material, and having so informed Mathis, defendant's operator, it was not error to admit evidence that plaintiff had contracted conditionally for the material at a stipulated price, although subsequently to the notice to the defendant, because such contracts might have reasonably been anticipated in the nature of the case: 1 Sedgwick on Damages, 7th ed., p. 239.

Hence it was not error to also refuse the special charge asked by the defendant.

But the appellant requested a special charge as to the duty of the plaintiff to exercise care and diligence to avoid loss, which was refused by the court, and is made the basis of an assignment of error. It was as follows: —

“Where a party has been damaged by the wrong of another, it is the duty of such party to use reasonable efforts and reasonable diligence — that is, such diligence as a reasonably prudent man would use under similar circumstances — to avoid or lessen his damages; and if you believe from the evidence that after Loonie had telegraphed for the plans and specifications at Kirkwood, July 3, 1886, he reached Chicago on July 7th, and that by that time, in the usual course of business, the plans and specifications called for by the telegram ought to have reached Chicago, and that they had not then reached Chicago, and you further believe under those circumstances a business man of reasonable prudence and caution would have sent another telegram to his agent at Meridian for the plans and specifications, and that if such a telegram had been sent by Loonie to his agent at Meridian, that in answer thereto the plans and specifications would have reached plaintiff before he left Chicago, in time for plaintiff to have consummated his transactions in respect thereto, then you are charged that if you find for plaintiff at all you can only allow him compensation for the value of his time and expenses during the extra time he would have been kept in Chicago on account of the delay.”

This instruction limited the plaintiff's right of recovery to compensation for the value of his time and expenses during the extra time he would have been kept in Chicago on account of the delay, and ignored his right to recover for the difference in the price of material resulting from such delay. But it was incumbent upon the plaintiff to show that he had sustained damages by reason of an advance in the price of material within such a time as by the use of reasonable diligence he could have had the plans and specifications forwarded to him. This he failed to do. It was the latter part of August before he finally contracted for the material; and although plaintiff testified in general terms that he had sustained damages in certain sums, which he named, by reason of the failure of the defendant to deliver the telegram, it is not shown by any evidence that any loss would have been sustained had the plain-

tiff telegraphed again for the plans and specifications, and awaited in Chicago for their arrival, or that there was any advance in price of material until more than a month after he could have had the plans and specifications by the use of reasonable diligence. There having been no testimony showing loss within such reasonable time, the special instruction requested by the defendant was pertinent and should have been given; and for the error of the court in refusing it the judgment should be reversed.

The evidence in the case was sufficient to warrant the finding that the defendant undertook to send the message in question; and the refusal of defendant's request for a special instruction to the contrary was not error.

We think that the points involved in appellant's twelfth assignment of error have already been practically disposed of, and do not require any further notice.

The judgment of the court below should be reversed, and the cause remanded for another trial, and we so report.

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**TELEGRAPH COMPANIES—DELAY IN DELIVERY OF MESSAGE—SPECIAL DAMAGES.** — A telegraph company is liable for such damage as is the direct or natural result of its failure to deliver a message, without regard to the degree of its negligence, where the message discloses on its face the necessity for prompt transmission and delivery: *Western U. Tel. Co. v. Brosche*, 72 Tex. 654; 13 Am. St. Rep. 843, and note; extended note to *Western U. Tel. Co. v. Cooper*, 10 Am. St. Rep. 785; *American U. Tel. Co. v. Daughtery*, 89 Ala. 191; *Reese v. Western U. Tel. Co.*, 123 Ind. 294; *Western U. Tel. Co. v. Clifton*, 68 Miss. 307; *Cutts v. Western U. Tel. Co.*, 71 Wis. 46. A telegraph company is liable for damage resulting naturally and in the usual course of business from its failure to deliver a message promptly, even though the sender fails to disclose its importance to its agent: *Western U. Tel. Co. v. Hyer*, 22 Fla. 637; 1 Am. St. Rep. 222, and note; see *Eric Tel. Co. v. Grimes*, 82 Tex. 80.

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## **NIX v. TEXAS PACIFIC RAILWAY COMPANY.**

[32 TEXAS, 472.]

**MASTER AND SERVANT—VICE-PRINCIPALS.** — While mere grades of rank of employees of a railway company engaged in a common employment will not destroy the relation of fellow-servants, yet where one is authorized to employ and discharge servants working under him and under his direction and control, his negligence is that of the master.

**MASTER AND SERVANT—DUTY TO FURNISH SAFE MACHINERY.** — When the machinery furnished by a master for the use of his servant is of the kind in common use for the same purpose, the master is justified in using it, and will not be liable for an injury caused thereby, unless he has informa-



tion or reason to believe that its use is attended with danger, or that a safer kind of machinery is in common use for doing the same kind of work.

**MASTER AND SERVANT — DUTY TO FURNISH SAFE MACHINERY — CONTRIBUTORY NEGLIGENCE OF SERVANT.** — A master is bound to use only ordinary care in furnishing safe machinery for the use of his servant, and if there is more danger in the use of the kind furnished than that in common use, and the servant knows it, or by the exercise of ordinary care and prudence should know it, he cannot recover for injuries caused by its use.

*W. H. Pope, and Wilson and Lane, for the plaintiff in error.*

*F. H. Prendergast, for the defendant in error.*

**COLLARD, J., Section A.** This suit was brought in the district court of Harrison County by John A. Nix, plaintiff in error, to recover of defendant in error, the Texas and Pacific Railway Company, actual damages for personal injuries alleged to have been caused under the following circumstances:—

Plaintiff and one Rapp were both in the employ of defendant, drilling a well for defendant at Sierra Blanco, Rapp as assistant foreman, and plaintiff working under him as engineer, Rapp being in charge of the work, and having power to employ and discharge hands engaged about the same. Plaintiff and Rapp were the only persons engaged in the work, and Rapp had employed plaintiff for defendant. On the twenty-fourth day of November, 1888, Rapp ordered plaintiff into the belt-room to oil up the machinery used to operate the drill. While plaintiff was in the belt-room, in obedience to this order, Rapp negligently, and without warning plaintiff, applied the steam to the machinery and set the same in motion. This he did from the drill by means of ropes and pulleys connected with the engine. At the time the machinery started plaintiff was at or near the driving-belt, which was fastened together by iron clamps, which were improperly constructed with square corners instead of round corners. The clamps caught up a hose used to supply the engine and machinery with water; the hose struck plaintiff and forced him against a pulley, injuring his leg severely and crippling him for life. Plaintiff worked at the engine and Rapp at the drill, where he could by means of the ropes apply the steam at will and regulate the drill. Plaintiff also alleged that he did not know that the iron flanges used to fasten the belt were improperly constructed and were dangerous, but that defendant did know such fact.

Defendant answered by pleas of not guilty and contributory negligence on the part of plaintiff.

The trial resulted in a verdict and judgment for defendant.

The first assignment of error is, that the court erred in the charge to the jury instructing them as follows: "If the evidence shows that the plaintiff and one Rapp were in the service of the defendant, and while so in the service the plaintiff's duty was to manage as an engineer a certain stationary steam-engine used for the purpose of driving a drill in order to sink a well for the defendant, and the said Rapp was to have charge of the drill used for the purpose of sinking said well, and by means of ropes and pulleys connecting the drill with the engine, Rapp's duty was to apply the steam force of said drill, then said Rapp and plaintiff were fellow-servants, and plaintiff could not recover for any injury to him by reason of any careless or negligent act of said Rapp, even though the jury believe that said Rapp had authority to employ and discharge the plaintiff from service of defendant."

This charge did not apply to the facts as shown by plaintiff, and was misleading. There was some evidence tending to show (but positively disputed by evidence for defendant) that Rapp was in charge of the work, and that plaintiff was subject to his orders, as well as that Rapp had authority to employ and discharge plaintiff.

The rule, as we understand it, as now settled by the supreme court of this state, is, that while mere grades of rank of employees of a railway company engaged in a common employment will not destroy the relation of fellow-servants, yet where one is authorized to employ and discharge servants working under him, his negligence would be that of the master: *Douglas v. Texas Mexican R'y Co.*, 63 Tex. 564. The power of such servant or agent to employ and discharge servants engaged with him in the same work will not alone constitute him the master, but where he has such power, as foreman of the work being done, over servants working under him and subject to his direction, his position is that of the master, and the master would be liable for his negligence causing injury to such servants: *Missouri Pac. R'y Co. v. Williams*, 75 Tex. 7; 16 Am. St. Rep. 867. The supreme court refused to recede from this doctrine in qualifying their approval of the opinion of the commission of appeals in the case of *Galveston etc. R'y Co. v. Smith*, 76 Tex. 618, 619; 18 Am. St. Rep. 78. The charge complained of in this case was misleading. The jury may have

understood it to mean that if Rapp had the power to employ and discharge Nix, still they would be fellow-servants, notwithstanding the latter may have been subject to the orders of the former. There was some evidence of this kind on plaintiff's side, which the jury may have thought had no effect under the charge. We do not say that the jury may not have found that Rapp was not authorized to employ and discharge, and that Nix was not working under him (the absence of either one of which facts would leave them fellow-servants), but the court having instructed the jury that they would be fellow-servants if Rapp had authority to employ and discharge Nix, it was misleading not to instruct them, in the same connection, that if Rapp had such power, and also the power as Nix's superior to direct and control him in his work, they would not be fellow-servants, but that Rapp would be the master.

At request of defendant, the court charged the jury that "if the fastening of the belt was the kind commonly used on well-boring machinery, then defendant would be justified in using it for boring wells, and would not be liable for any damage caused by its use, unless defendant had information or reason to believe that its use was attended with danger." Plaintiff says that the court erred in refusing to give, in this connection, his requested charge, as follows: "If the fastenings on the belt were not, however, the same as those shown by defendant to have been used on such machinery, and if the corners of the iron plates on the belt were cut square, and if the corners of the fastenings of the machinery in common use for well-boring were rounded, and if the square corners were more dangerous than rounded, and the difference in said fastenings in any manner contributed to the cause of the injury, then defendant would not be protected in using them."

There was evidence before the court and jury to which the requested charge of the defendant given, and to which the requested charge of the plaintiff refused, applied. The court having instructed the jury that if the iron clamps used to fasten the belt used by defendant were in common use and were not known to be dangerous the defendant would not incur liability for injuries caused by them to an employee, the converse of the proposition should have been given when requested, there being some evidence to the effect that those used by defendant on this belt were not like those in common use, and were more dangerous because of their square instead of rounded corners.

In giving both the requested charges, the court should also have told the jury that the defendant was only bound to use ordinary care in furnishing machinery for the use of its employees, and that if there was more danger in the use these clamps than those in common use, and plaintiff knew it or might have known it by the exercise of such care as a man of ordinary prudence and care would have used under like circumstances, he could not recover for injuries caused by them. If plaintiff knew the risk, if there was any, in using the belt, or should have known it by such care, or if its defects were patent and open to common observation, he would be held to have assumed the risk, with others incident to his employment: *Rogers v. Galveston etc. R'y Co.*, 76 Tex. 505, 506, and authorities cited.

We conclude the judgment of the court below ought to be reversed and the cause remanded.

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**FELLOW-SERVANTS AND VICE-PRINCIPALS, DISTINCTION BETWEEN:** See *Harrison v. Detroit R. R. Co.*, 79 Mich. 409; 19 Am. St. Rep. 180; *Ross v. Walker*, 139 Pa. St. 42; 23 Am. St. Rep. 160, and note. The cases of *Harrison v. Detroit R. R. Co.*, 79 Mich. 409, 19 Am. St. Rep. 180, and *International R. R. Co. v. Hissie*, 82 Tex. 623, agree with the principal case in holding that the power of discharging an employee, accompanied by full control of the work, will make the superior employee a vice-principal. A vice-principal is regarded as such only so long as he represents the master in performing the duties which the master owes to his employees: *Ross v. Walker*, 139 Pa. St. 42; 23 Am. St. Rep. 160, and note. Thus a superior servant, who is also employed as a "boss" or foreman of other workmen with whom he labors, is not a vice-principal while engaged in executing work designed or directed by the master or his vice-principal: *O'Brien v. American D. Co.*, 53 N. J. L. 291. Whether in a given case one is acting as the representative of the master, or merely as a co-employee, depends upon the character of the duties imposed upon him, and which he is performing at the time, and not upon his rank or title: *Nall v. Louisville R. R. Co.*, 129 Ind. 260. Thus a yard-master is a vice-principal with respect to a car-repairer, if the duty of protecting such an employee has been delegated to him: *R'y Co. v. Triplett*, 54 Ark. 289. And a similar relation exists between a conductor and a brakeman: *Richmond v. Danville R. R. Co.*, 86 Va. 165; 19 Am. St. Rep. 876; though this last doctrine is not everywhere accepted: See note to case just cited.

**RAILROADS, DUTY OF, TO EMPLOYEES.** — It is the duty of a railroad company to provide and maintain suitable appliances for its employees to work with: *Cincinnati etc. R. R. Co. v. McMullen*, 117 Ind. 439; 10 Am. St. Rep. 67; but this duty does not extend beyond the exercise of reasonable care: *Little Rock etc. R'y Co. v. Hubanks*, 48 Ark. 460; 3 Am. St. Rep. 245; *Gutridge v. Mo. Pac. R'y Co.*, 94 Mo. 468; 4 Am. St. Rep. 392; *Gulf etc. R'y Co. v. Wells*, 81 Tex. 685; *International etc. R'y Co. v. Williams*, 82 Tex. 342; *U. P. R'y Co. v. Broderick*, 30 Neb. 735; *Humphreys v. Newport etc. R'y Co.*, 33 W. Va. 135; *Gurneau O. Co. v. Palmer*, 28 Neb. 307. A railroad is not required to adopt every appliance which even a majority of the well-regulated roads have

adopted: *Louisville etc. R. R. Co. v. Hall*, 91 Ala. 112; 24 Am. St. Rep. 863. Nor to furnish any particular kind of tools, implements, or appliances: *Bela v. Chicago etc. R'y Co.*, 106 Mo. 429. A master is not liable for hidden defects in implements and machinery, where due care is exercised in the selection of the material: *Carlson v. Phoenix B. Co.*, 132 N. Y. 273.

CONTRIBUTORY NEGLIGENCE OF SERVANT. — Employee of railroad assumes ordinary risks incident to the service: *St. Louis etc. R. R. Co. v. Irwin*, 37 Kan. 701; 1 Am. St. Rep. 266. Among these risks are included not only those of which he has actual knowledge, but also those of which he reasonably ought to have known; *Latre mouille v. Bennington etc. R'y Co.*, 63 Vt. 337; and those which his own special duties enabled him to appreciate more accurately than his employer or his co-servants: *Week v. Fremont Mill Co.*, 3 Wash. 629. But not those of which he is ignorant, or in respect to which he has not the same means of knowledge as his master: *Humphreys v. Newport etc. R'y Co.*, 33 W. Va. 135. Nor those which are not discoverable by ordinary observers, even though the defect is apparent: *Davidson v. Cornell*, 132 N. Y. 228. The burden of proof is on the servant to show that the machinery was defective: *Humphreys v. Newport etc. R'y Co.*, 33 W. Va. 135.

## INTERNATIONAL AND GREAT NORTHERN RAILWAY COMPANY v. ANDERSON.

[32 TEXAS, 514.]

EVIDENCE — RES GESTÆ — DECLARATIONS. — All declarations or exclamations uttered by the parties to a transaction which are contemporaneous with and accompany it, or which are made under such circumstances as will raise a reasonable presumption that they are the spontaneous utterance of thoughts created by or springing out of the transaction itself, and so soon thereafter as to exclude the presumption that they are the result of premeditation or design, and which are calculated to throw light on the motives and intention of the parties, are admissible in evidence as part of the *res gestas*.

EVIDENCE — DECLARATIONS SUBSEQUENT TO ACCIDENT. — Declarations of one injured in a railroad accident, as to its cause, made at the place, within a few minutes after it occurred, and while he was still writhing under the pain inflicted by it, are admissible as part of the *res gestas*.

RAILWAYS — BRAKEMAN'S AUTHORITY — BURDEN OF PROOF. — A brakeman upon a railroad train has no implied authority to eject a trespasser from the cars; and in an action against the railroad company, the burden of proof is upon the party injured, to show that in ejecting him the brakeman acted within the scope of his authority.

MASTER AND SERVANT — LIABILITY OF MASTER FOR ACT OF SERVANT. — In order to hold a master liable for the act of his servant, it is not necessary that the latter should have authority to do the particular act in question; but it must be done within the scope of his general authority, in furtherance of the master's business, and for the accomplishment of the object for which the servant is employed; and whether the act can be implied from the general authority conferred upon him depends upon

the nature of the services he is engaged to perform, and the circumstances of each particular case.

**MASTER AND SERVANT—LIABILITY OF MASTER FOR WRONGFUL ACT OF SERVANT.** — When a servant performs the duty for which he is engaged in a wrongful manner, and to the injury of another, the master is liable, although he may have expressly forbidden the particular act.

**RAILWAYS—CONDUCTOR AND BRAKEMAN, IMPLIED AUTHORITY OF, TO EJECT TRESPASSERS.** — The conductor on a railroad train has implied authority to eject trespassers therefrom, and may call to his aid the other servants of the company; but a brakeman has no such implied authority unless called upon by the conductor to act.

*N. B. Morris, and Gould and Camp, for the appellant.*

*W. C. Buford, W. J. Graham, and J. H. Turner, for the appellee.*

**GAINES, A. J.** This action was brought by appellee to recover of appellant damages for personal injuries alleged to have been inflicted by a servant of the company. The case made by the pleadings and proof by the plaintiff was, that as a freight train of the defendant company was drawing out of a station he attempted to board a box car by means of the ladder, and that thereupon a brakeman accosted him roughly and ordered him off. He objected on account of the speed of the train; but the brakeman repeated his order, and struck him a blow which caused him to fall under the wheels and to receive the injuries of which he complains. On behalf of the railway company it was claimed in defense,—1. That the plaintiff was not interfered with by the brakeman, and that he negligently attempted to board the car while in motion and was thrown to the ground; and 2. That if he was struck by the brakeman, the act was not done in the scope of the latter's employment.

The testimony showed that the plaintiff fell from a car, and that the wheels passed over him, crushing his arm and breaking his leg. The controversy was as to the cause of the accident. A witness was permitted to testify, over objection of defendant, "that on the morning of the accident he heard a train going south, and just after it passed he heard some one that he took to be plaintiff crying for help. This was about 150 or 200 yards from witness's house. He immediately got up out of bed and put on his clothes, and went hurriedly to where plaintiff was lying, near the railway track, badly hurt by the train. No person was there when witness got there. The conductor and other trainmen were in a short distance,

coming in that direction. Before they got there, plaintiff told witness that a brakeman knocked him off the train, and it ran over him. That the plaintiff was crying out in his misery, and made the statement several times."

An exception was reserved to the admission of the testimony, and it is now assigned as error.

Were the declarations of plaintiff admissible as a part of the *res gestæ*? All declarations or exclamations uttered by the parties to a transaction, and which are contemporaneous with and accompany it, and are calculated to throw light upon the motives and intention of the parties to it, are clearly admissible as parts of the *res gestæ*. Very respectable authorities restrict the doctrine of *res gestæ* within the limits indicated by the foregoing definition, and exclude all declarations which are a narrative of past occurrences. This is a convenient and salutary rule, and probably the more logical one; and if it were an open question in this state, we should hesitate long before adopting another. Another rule, applied in many of the American courts at least, is to admit as parts of the *res gestæ* not only such declarations as accompany the transaction, but also such as are made under such circumstances as will raise a reasonable presumption that they are the spontaneous utterance of thoughts created by or springing out of the transaction itself, and so soon thereafter as to exclude the presumption that they are the result of premeditation or design: *Travelers Ins. Co. v. Mosley*, 8 Wall. 397; *Commonwealth v. McPike*, 3 Cush. 181; 50 Am. Dec. 727; *Hanover R. R. Co. v. Coyle*, 55 Pa. St. 396; *Elkins v. McKean*, 79 Pa. St. 498; *Monday v. State*, 32 Ga. 672; 79 Am. Dec. 314; *People v. Vernon*, 35 Cal. 49; 95 Am. Dec. 49; *Little v. Commonwealth*, 25 Gratt. 921; *Harriman v. Stowe*, 57 Mo. 93. In most of the cases cited the declarations admitted were the relation of past occurrences. This line of decision has been followed in this court: *Galveston v. Barbour*, 62 Tex. 172; 50 Am. Rep. 519; and in view of the great array of authority in support of that ruling, we deem it best to adhere to it in this case. The declarations under consideration were made at the place of the accident, and within a very few minutes after it occurred, and while the plaintiff was still writhing under the pain inflicted by it. We conclude that the testimony was properly admitted.

There was testimony to the effect that the brakemen on defendant's road were seen to put persons off the train and to



keep them from getting on. The only other testimony bearing upon the question of the authority of the brakeman who was alleged to have put the plaintiff off the train was that of a conductor in the service of the defendant company, who testified that it was the duty of the company's conductors to eject trespassers from the train; that if they wished they could delegate this authority to the brakeman, but that without such delegation a brakeman had no authority to do so; some conductors enforced the rule in person, and others through their brakemen. Such being the evidence upon this point, the court instructed the jury "that a railway company is not responsible for the willful trespass or unlawful acts of agents, done clearly outside of the scope of their employment; but when a brakeman on a train undertakes to keep persons from getting on his train or to expel them, in the absence of proof to show that this was outside of the scope of his duties, there would be no presumption that such was the fact."

The practical effect of this instruction was to induce the jury to believe that the burden was upon the defendant to show that the brakeman who ejected the plaintiff from the car was not acting within the scope of his authority. The burden was upon the plaintiff to prove the facts which would entitle him to recover. When a recovery is sought of the master for an injury inflicted by his servant, the plaintiff must show that the servant did the wrong while acting within the scope of his employment. It follows that unless we can say that a brakeman has an implied authority to eject trespassers from the train upon which he is employed, the charge was error, for which the judgment must be reversed.

To hold the master liable for the act of his servant, it is not necessary that the servant should have authority to do the particular act. The act of the servant may be contrary to his express orders, and yet the master may be liable. But the act must be done within the scope of the general authority of the servant. It must be done in furtherance of the master's business, and for the accomplishment of the object for which the servant is employed. For the mode in which the servant performs the duty he is engaged to perform, if wrongful and to the injury of another, the master is liable, although he may have expressly forbidden the particular act. But whether the act in question can be implied from the general authority conferred upon the servant must in general depend upon the nature of the service he is engaged to perform and the circum-

stances of the particular case. We know that as a general rule the conductor of a railway train has the general control and management of his train. His position has been likened to that of the master of a ship. It is necessary, as well for the protection of the interests of the company as for the security of the persons and property intrusted to his care, that he should have authority to eject trespassers from the cars under his control. Therefore it has been held in numerous cases that he has an implied authority to do this: *Ramsden v. Boston etc. R. R. Co.*, 104 Mass. 117; 6 Am. Rep. 200; *Schutz v. Third Ave. R. R. Co.*, 89 N. Y. 242; *Railway v. Duncan*, 15 Am. & Eng. R'y Cas. 422; *Railway v. Toomay*, 1 Am. & Eng. R'y Cas. 461. It has also been held that a locomotive engineer has an implied authority to eject trespassers from his engine: *Carter v. Railway*, 8 Am. & Eng. R'y Cas. 348; 22 Am. & Eng. R'y Cas. 360. So, also, a railway company was held liable for the use of unnecessary force by a station-agent in expelling a trespasser from a station-house: *Johnson v. Chicago etc. R'y Co.*, 58 Iowa, 348. An engineer has the charge and control of his engine, and it is necessary for the safe performance of the important duties devolved upon him that he should have authority to remove persons trespassing upon it. So it may be the duty of a station-master in charge of a station-house to eject persons not lawfully there, when their presence is detrimental to the interests or forbidden by the rules of the company.

But we fail to see that any necessity exists for conferring authority upon a brakeman to eject trespassers from the cars. The conductor has this power, and it is to be presumed power also to call to his aid the other servants of the company upon the train. The name "brakeman" would imply that it is the principal duty of that servant to attend to the brakes, and it is not to be inferred that he has control over the train, or any particular car or set of cars. Accordingly we find it distinctly held that a brakeman has no implied authority to eject trespassers from the cars: *Towanda Coal Co. v. Heeman*, 86 Pa. St. 418. We have found no case which, when carefully analyzed, justifies a holding that a brakeman has such implied authority. We conclude that for the error in the charge quoted, the judgment must be reversed.

We are of opinion that upon another trial the conversation

had by the plaintiff with the brakeman before getting on the train should be excluded.

The other questions presented in the briefs need not arise upon another trial, and will not be considered.

The attention of counsel for the appellant is called to the fact that his brief does not comply with the rules. The assignments of error should not all be grouped together, but each should be presented separately, with its appropriate propositions and statements under it.

The judgment is reversed, and the cause is remanded.

**EVIDENCE — RES GESTÆ.** — As to what conditions must be fulfilled to constitute a circumstance or a declaration a part of the *res gestæ*, see *Bush v. Roberts*, 111 N. Y. 278; 7 Am. St. Rep. 741; *Leahy v. Cass Ave. etc. R'y Co.*, 97 Mo. 165; 10 Am. St. Rep. 300; *Ward v. White*, 86 Va. 212; 19 Am. St. Rep. 883. That utterances of injured persons immediately after an accident are admissible as part of the *res gestæ*, see *Little Rock etc. R'y Co. v. Leverett*, 48 Ark. 333; 3 Am. St. Rep. 230; *Louisville etc. R'y Co. v. Buck*, 116 Ind. 566; 9 Am. St. Rep. 883; *Leahy v. Cass Ave. etc. R'y Co.*, 97 Mo. 165; 10 Am. St. Rep. 300; *Pennsylvania R. R. Co. v. Lyons*, 129 Pa. St. 113; 15 Am. St. Rep. 701; *Kennedy v. Rochester etc. R'y Co.*, 130 N. Y. 655. In *Olivier v. Louisville etc. R'y Co.*, 43 La. Ann. 805, it was held that the statements of a companion, made in the presence of an injured person, without contradiction from the latter, were also admissible as part of the *res gestæ*.

On the other hand, complaints which are so far detached from the occurrence as to admit of deliberate design are not parts of the *res gestæ*; *Kennedy v. Rochester etc. R'y Co.*, 130 N. Y. 654. As to the weight to be attached to the statements of sick persons regarding their physical condition, see *Central R. R. Co. v. Smith*, 76 Ga. 209; 2 Am. St. Rep. 31; *Fleming v. Springfield*, 154 Mass. 520; *Davidson v. Cornell*, 132 N. Y. 228.

**EVIDENCE THAT BRAKEMEN** are in the habit of ejecting from train tramps who refuse to pay their fare is admissible to prove that it is within the line of a brakeman's duty to eject a person for the non-payment of his fare: *St. Louis etc. R'y Co. v. Hendricks*, 48 Ark. 177; 3 Am. St. Rep. 220.

**THE GENERAL RULE** is, that a railroad company is answerable for acts of its servants in the course of their employment, whether abusing or rightfully pursuing the powers conferred on them, and whether acting within or in direct violation of their instructions: *Lake Shore etc. R. R. Co. v. Brown*, 123 Ill. 162; 5 Am. St. Rep. 510; *Chicago etc. R'y Co. v. West*, 125 Ill. 320; 3 Am. St. Rep. 380; *Williams v. Pullman Palace Car Co.*, 40 La. Ann. 87; 3 Am. St. Rep. 512. See also notes to *Savannah Street R. R. Co. v. Bryan*, 22 Am. St. Rep. 465; and *Dillingham v. Russell*, 73 Tex. 47, 15 Am. St. Rep. 752, which holds that if the servant of a common carrier, in performing any duty within the line of his employment, uses unnecessary force in doing an act lawful in itself, and thereby commits a trespass or a crime, the carrier is responsible.

**WHETHER PARTICULAR ACT OF SERVANT** was or was not done in the line of his duty is a question to be determined by the jury from the surrounding facts and circumstances: *St. Louis etc. R'y Co. v. Hendricks*, 48 Ark. 177; 3

Am. St. Rep. 220. See also *Dwinelle v. New York etc. R. R. Co.*, 120 N. Y. 117; 17 Am. St. Rep. 611, to the same point.

THE CONDUCTOR OF A RAILROAD TRAIN has the right to direct all the movements of the train: *Rauch v. Lloyd*, 31 Pa. St. 358; 72 Am. Dec. 747; and to require one who does not pay his fare to leave the train: *Skalar v. St. Louis etc. Ry Co.*, 92 Mo. 339. Where a person represents himself to be the conductor, is possessed of the paraphernalia of that official, and is actually engaged in taking fares from the passengers, a strong presumption arises that he is in fact the conductor of the train: *Lampkins v. Vicksburg etc. R. R. Co.*, 42 La. Ann. 998.

A BRAKEMAN employed on a freight train in charge of a conductor has no implied authority to bind the company by a contract of passage: *Candiff v. Louisville etc. Ry Co.*, 42 La. Ann. 477.

## WILSON v. DENTON.

[32 TEXAS, 321.]

### NEGOTIABLE INSTRUMENTS — PURCHASER IN GOOD FAITH — EVIDENCE —

The possession of a negotiable instrument, acquired in good faith and in the usual course of trade, constitutes the holder a purchaser, whether the person from whom it was received had title or not, and the rule is not affected by the fact that the statute omits the words "in the usual course of trade," as the *mala fides* of the transaction may always be established by circumstantial evidence.

NEGOTIABLE INSTRUMENTS — PURCHASER IN GOOD FAITH. — A promissory note given by the purchaser of a negotiable instrument, claimed to have been acquired in good faith in the usual course of trade, is a valuable consideration, though its inadequacy may be shown on the issue of good faith.

*J. A. B. Putman, and Petest and Crosby, for the appellants.*

*Leach and Templeton, for the appellees.*

GARRETT, P. J., Section B. Suit by the appellants, J. O. and J. A. Wilson, against K. T. Denton and others to recover the possession of two promissory notes. The notes were in the possession of the City National Bank of Sulphur Springs, a defendant in the suit, which had them for collection. Cotter and McMullan, also appellees, intervened in the suit and claimed to own the notes, and asked for judgment for possession thereof. The notes were payable to plaintiffs J. O. and J. A. Wilson, or bearer, and were executed by J. H. McClimons, who was also a party defendant. They were for one thousand dollars each, dated the same day, August 5, 1889, due at twelve months and two years respectively, with semi-

annual interest at the rate of twelve per cent per annum, and were secured by mechanic's lien on a building erected for McClimons by plaintiffs. There was a prior lien on the building for one thousand dollars. The building was worth about six thousand dollars.

Denton had been intrusted with the possession of the notes by the plaintiffs, in order to sell them to one Womack. He did not do this, but on February 1, 1890, sold them to Cotter and McMullan in consideration of their two notes to Denton's wife for nine hundred dollars each, bearing twelve per cent interest, due in four and sixteen months after date, and his account with them for thirty-six dollars.

Trial was had before the court without a jury, and judgment was rendered in favor of the intervenors, Cotter and McMullan. Plaintiffs have perfected their appeal to the supreme court, and have properly assigned errors, for which it is sought to reverse the judgment of the court below.

Without undertaking to take up and dispose of the several assignments of error in their order, we shall dispose of the questions presented by them as they arise in a general consideration of the case.

Plaintiffs were brick-masons and contractors, and the defendant Denton was a carpenter and contractor, living in Sulphur Springs. They were intimate friends, and stood well and were regarded as solvent in the community. They were not partners in business, but when plaintiffs, who were partners, obtained a contract for a building they usually sublet the wood-work to Denton, and when he obtained the contract he would sublet the brick-work to plaintiffs. The plaintiffs made a contract with McClimons to erect for him a brick building upon a lot in Sulphur Springs, and sublet the contract for the wood-work to the defendant Denton. The notes in controversy were part of the proceeds of said contract, and were secured by a mechanic's lien on the building, which was duly recorded and fixed. Denton had no interest in the notes. They were the property of the plaintiffs, who, in August, 1889, intrusted them to Denton for the purpose of sale to one Womack. This was done at the suggestion of Denton, who told J. A. Wilson, the active member of the firm of J. O. and J. A. Wilson, that he could sell the notes to Womack for two thousand dollars. Denton failed to sell to Womack, and on Wilson's request for the notes, afterward put him off on one pretense and another until about Christmas, when Denton claimed that

Wilson owed him, and refused to turn the notes over until they settled. Wilson was ready to settle, and endeavored to do so, but they failed to come to terms, and soon fell out. Finally Denton asserted a claim of ownership, claiming that he had bought the notes from the Wilsons for what they were owing him. Denton made several efforts to sell the notes, and Wilson notified one party not to buy them from Denton.

Cotter and McMullan were merchants, and had known Denton for a long time and had confidence in him. They knew of his dealings with the Wilsons and their intimacy. They regarded both Denton and the Wilsons as reliable and honorable men; had never heard of the differences between them, and knew that during the year 1889 the Wilsons had built several houses, and that Denton did the wood-work for them.

About January 27, 1890, Denton went to Mr. Cotter, told him of the notes, and offered to sell them to him for nineteen hundred dollars, as he needed money. But Cotter did not then buy. A day or so afterward Denton again offered to sell the notes to Cotter, showed them to him, and told him that they were written by Judge Putnam, who had drawn the contract fixing the lien. He agreed to trade the notes to Cotter and McMullan for their notes, because he could get the money on their notes. No trade was made then. Cotter conferred with his partner, and they agreed to offer Denton their notes for eighteen hundred dollars for the McClimons notes. Denton found a purchaser for Cotter and McMullan's notes, and on February 1, 1890, again went to see Cotter and McMullan, and sold the notes to them for their two notes for nine hundred dollars each and his store account for thirty-six dollars. Cotter and McMullan drew up and signed notes payable to Denton, who requested notes payable to his wife. The first notes were then destroyed, and notes were executed payable to Denton's wife, and were soon after sold by Denton to one Lacy for face value. Cotter was somewhat suspicious, but Denton explained that he was indebted to his wife, and wanted the notes in her name, so that the money would be hers. This explanation satisfied Cotter, and the transaction was closed. All the parties who had had any connection with the notes — McClimons, the maker; the Wilsons, the payees; and Judge Putnam, who drew the papers — resided in Sulphur Springs, and Cotter met them daily, but did not speak to any of them about the transaction or the notes. He sent the notes by the defendant Denton, who was going to Dallas, to be

placed in the hands of parties there for collection. His explanation of this was, that McClimons was slow pay, that the semi-annual interest would soon fall due, and that if McClimons knew that he owned the notes he would ask for an extension, which he did not care to give; and that as Denton was going to Dallas, he sent them by him, and they were sent through a bank at Dallas to the Sulphur Springs bank for collection. Cotter bought the notes, relying implicitly upon Denton's statements, which he believed to be true. He had no actual notice of any claim the Wilsons had in the notes, and McMullan had none, and they believed, when they bought the notes, that they belonged to Denton, and that they were getting a good title to them.

Upon the question of notice, the learned judge who tried the case below found that Cotter and McMullan did not have actual notice of the invalidity of Denton's title to the notes, and that the facts were not sufficient to charge them with constructive notice. Appellants contend that the latter finding is not supported by the evidence; also that the court erred in its conclusion of law that the character of constructive notice necessary to charge the intervenors must be such as to show a want of good faith.

The ordinary rule of constructive notice which applies to the purchase of property is not applicable in the case of negotiable instruments. As promotive of their circulation, a liberal view is taken, which makes the *bona fides* of the transaction the decisive test of the holder's right. He is entitled to recover upon it if he has come by it honestly: *Greneau v. Wheeler*, 6 Tex. 525; 1 Daniel on Negotiable Instruments, sec. 775. It matters not how the vendor came in possession of the bill or note, whether by theft, or fraud, or honestly; the title of the transferee does not depend upon the title of the vendor, but upon his possession, and if the buyer has acted in good faith and paid a valuable consideration, his title cannot be impugned. An early English case (*Gill v. Cubitt*, 8 Barn. & C. 466) laid down the principle, that although the holder had given value for the bill or note, yet if he took it under circumstances which ought to have excited the suspicions of a prudent and careful man, he could not recover. This was a departure from the earlier rule, which regarded the *bona fides* as the crucial test by which it was to be determined whether or not the purchaser should be protected against defenses that would be valid against the transferrer of the note. But the



earlier rule was soon again reverted to, and afterward made even more liberal; and it became the law, that while gross negligence might be evidence tending to show *mala fides*, and as such admissible, it did not in itself amount to proof of *mala fides*, and was not sufficient to deprive the holder of his right to recover. If it should be left to a jury to determine as to the degree of caution which a prudent man must exercise on taking such an instrument, it would lead to much perplexity and to frequent injustice. This is the law deduced from the English decisions by Mr. Daniel in his admirable work on negotiable instruments, secs. 770 et seq.

A review of the American authorities shows by far the greater number concurring in the principle which has been finally established as the law of England: Daniel on Negotiable Instruments, sec. 775. We think the entire question is one of bad faith, and that our supreme court adopted this rule as early as the case of *Greeneaux v. Wheeler*, 6 Tex. 525. Judge Hemphill said, in *Weathered v. Smith*, 9 Tex. 625, 60 Am. Dec. 186: "The possession of the instrument, acquired in good faith in the usual course of trade, gives property, whether the person from whom it was received have title or not. This doctrine, founded on the necessity of securing the benefits accruing from the free circulation of commercial paper, had its origin in the case of *Miller v. Race*, 1 Burr. 452, in application to bank-notes, and was subsequently extended to all negotiable instruments transferable by delivery." Thus early in our state was this most salutary principle from the older commercial states and from England adopted; at a time, too, when its commerce was in its infancy. It is a rule that is now far more imperatively demanded by our commercial interests, which have since then grown to much greater proportions than they were in those days.

We think the other questions presented bear upon the question of good faith. It will be observed that our Revised Statutes (art. 265) does not use the qualification "usual course of trade." But this cannot affect the rule, for it would be admissible always to establish *mala fides* by circumstantial evidence, and the manner in which the title should be acquired would be a subject of inquiry, as tending to establish the main fact of good or bad faith. Again, we do not suppose it would be contended that the omission of this qualification would shut off defenses to a note transferred to a trustee for creditors and holders of like character. So it may well be doubted whether

the omission of this usual restriction in our statutes really amounts to anything: *Davis v. Gray*, 61 Tex. 506; *Kauffman v. Robey*, 60 Tex. 310; 48 Am. Rep. 264. Cotter and McMullan bought the notes at a discount in order to make a profit on them. They got them for less than their face value, but not at so great a discount as to suggest fraud. In the case of *Greneaux v. Wheeler*, 6 Tex. 525, the note had been purchased from an attorney at law, who held it for a client, at fifty cents on the dollar.

There must be a valuable consideration paid for the note in order to protect the purchaser. It is not necessary that the consideration should be full and adequate. Its inadequacy may, however, be considered as a circumstance on the issue of good faith. It was shown that Cotter and McMullan paid for the notes in controversy with their own notes. Other negotiable notes of the purchaser constitute a valuable consideration; and the giving of a note by the purchaser of a negotiable instrument is a sufficient consideration to make him a *bona fide* holder for value: Randolph on Commercial Paper, sec. 479. It has been held in this state that a note payable to bearer, given for land, is a valuable consideration: *Cameron v. Romele*, 53 Tex. 244; *Dodd v. Gaines*, 82 Tex. 429.

The purchasers of the notes, Cotter and McMullan, could not have been affected by any knowledge that Lacy had of the invalidity of Denton's title; so it will not be necessary to inquire whether or not the finding of the court that Lacy was an innocent purchaser of the notes executed by Cotter and McMullan to Mrs. Denton is supported by the evidence.

We find no error in the judgment of the court below, and recommend that it be affirmed.

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NEGOTIABLE INSTRUMENTS — BONA FIDE PURCHASER. — On the question of who must be deemed a *bona fide* purchaser of a negotiable instrument, see *Kelley v. Whitney*, 45 Wis. 110; 30 Am. Rep. 697, and note 701-703; note to *First Nat. Bank v. County Comm'r*, 100 Am. Dec. 196-199; note to *Bay v. Coddington*, 9 Am. Dec. 272, 273; *Drelling v. First Nat. Bank*, 43 Kan. 197; 19 Am. St. Rep. 126; *Rice v. Jones*, 103 N. C. 226; 14 Am. St. Rep. 801, and note; *Fitzgerald v. Barker*, 96 Mo. 661; 9 Am. St. Rep. 375, and note; *East Birmingham etc. Co. v. Dennis*, 85 Ala. 565; 7 Am. St. Rep. 73. One who takes a note before maturity for value in good faith is a *bona fide* purchaser thereof; *Griffith v. Shipley*, 74 Md. 591; *Mars v. Mars*, 27 S. C. 132; *Smith v. Lockwood*, 80 Wis. 490.

## WESTERN UNION TELEGRAPH COMPANY v. NATIONS.

[82 TEXAS, 599.]

**TELEGRAPH COMPANIES — DELAY IN DELIVERY OF MESSAGE — DAMAGES FOR MENTAL ANGUISH.** — Where a telegraph company receives a pre-paid message from a mother to her son, consisting of the words, "Your step-father died this morning," with notice that it is important that it be sent at once, she may recover damages for the mental anguish sustained from the non-delivery of the message.

*A. H. Field*, for the appellant.

*B. W. Foster*, for the appellee.

GARRETT, P. J., Section B. Parthena Nations brought this suit against the Western Union Telegraph Company for damages, consisting in injury to feelings arising from the alleged failure of the appellant to deliver a telegram to her son, S. H. Perry, announcing the death of her husband. She alleged that she was deprived of the aid, consolation, and advice her son would have given her, and of his presence as a staff to uphold her in such a dire calamity; and that she was damaged in the sum of twenty-five cents paid for the transmission of the telegram, and in injury to her feelings.

There was a plea of general denial by the defendant.

No jury having been demanded, the law and the facts were submitted to the court, which rendered judgment in favor of plaintiff for the sum of three hundred dollars. Defendant excepted and gave notice of appeal, and the case is before us for revision upon proper assignment of errors.

The findings of fact which were filed by the judge, so far as they are pertinent to this appeal, may be summarized as follows:—

Plaintiff was twice married. S. H. Perry, to whom the telegram was addressed, was a son by the first marriage, and resided in Sulphur Springs, Hopkins County. Plaintiff had been married to Mr. Nations about twenty years, and by him also had children. On November 6, 1887, she and her husband and their two children lived two miles from Anona, a railway station in Red River County, where defendant had a telegraph station. Defendant also had a telegraph station at Sulphur Springs. Mr. Nations died that day early in the morning, and plaintiff sent Joseph Nations, her son, seventeen years of age, and a neighbor to Anona to telegraph for her son S. H. Perry, and they immediately went and delivered to defendant the following telegram:—

"ANONA, 11-6, 1887.

"To S. H. PERRY, Sulphur Springs, Texas.

"Your step-father died this morning.

"MRS. P. NATIONS."

They paid forty cents for the transmission of the message, which was the regular price. Joseph Nations told the agent at the time that his father was dead, and that he wanted the telegram sent at once; that it was important that it should be rushed through at once.

The message was sent at once, and was received by defendant's agent at Sulphur Springs by 11:30 o'clock that morning, and he gave it to the messenger-boy for delivery. There was a negligent failure to make a delivery of the telegram for several days. If the telegram had been delivered promptly, as might have been done, Perry could have left Sulphur Springs before seven o'clock, P. M., on November 6th, by rail, and arrived at Anona by ten, A. M., the next day. He would have gone to his mother at once. He did go on November 13th, when he finally received the telegram.

Plaintiff had resided at Anona only a short time, and desired to bury her husband at their old home, near Blossom Prairie, in Lamar County. She desired her son to be with her for the advice and consolation his presence would afford her, and to arrange and superintend the burial, and aid her in moving the corpse; but failing to hear from him, she kept the body until late in the evening of November 7th, when she was compelled to bury it, about dark on that day, at Anona.

There are two questions presented: Was there any damage or injury for which the law would compensate Mrs. Nations? If so, was there anything in the message to indicate her desire to have her son with her, or that any action was to be taken by him? Appellant violated its contract with Mrs. Nations promptly to send and deliver the telegram to S. H. Perry with all reasonable dispatch; and for a breach of the contract she was entitled to recover the sum paid to appellee for the transmission of the message, and injury to feelings, as actual damage, if the facts should show that such injury was occasioned as the law would allow compensation for, and that the damage was reasonably within the contemplation of the parties when the contract was made. We cannot doubt that the grief of Mrs. Nations at the death of her husband was attended with disappointment and anguish at the failure of her son to arrive and be present with her, with consolation and advice

and direction in the burial of her deceased husband. This additional source of grief was from an independent cause, and was a proximate result from the breach of its contract by the defendant. It cannot be said, as in *Rowell v. Western Union Tel. Co.*, 75 Tex. 26, that the bitter disappointment of Mrs. Nations at the absence of her son was a mere continuation of the grief over the death of her husband. From the language of the telegram itself, to say nothing of the testimony of the witness Joseph Nations, that he told the operator that his father was dead, and that it was important that the telegram be rushed through at once, the defendant was bound to know that the mother was informing her son that her husband was dead. It was unnecessary that the telegram should contain in its terms an invitation to the son to come and be with her, for such was the reasonable interpretation to put upon it. It was information from the grief-stricken mother to her son that his step-father (her husband) was dead, and it could be hardly presumed that an express invitation would be needed for him to come.

The case of *Reese v. Western Union Tel. Co.*, 123 Ind. 294, is upon very similar facts, and is very much in point, the only difference being that it is not so strong a case upon the facts as this case. In that case, the telegram was: "My wife is very ill; not expected to live." It was signed William Reese, and addressed to A. S. Clements, who was his brother-in-law. The court said: "It is true, there was nothing in the telegram to indicate the kinship that existed between the appellant and the person to whom the message was addressed, nor did it request the presence of Mr. Clements or his wife at the bedside of the dangerously sick sister-in-law, but this affords no excuse to the appellee for its failure to deliver the telegram." And again: "From the information before it when it entered into the undertaking, the appellee was bound to know that mental anguish might, and most probably would, come to some person in case it failed to act promptly in transmitting and delivering the dispatch, and therefore such a result was contemplated when the message was delivered by the appellant to the appellee's agent at Jamestown, and is within the undertaking. Whether such mental suffering would be caused by the failure of a brother-in-law and wife to go at once to the bedside of a dying sister-in-law, or from the failure of a physician to reach his patient while there was still hope that some-

thing might be done to bring relief, and possibly a restoration of health, or for some other cause, is unimportant."

In *Western Union Tel. Co. v. Broesche*, 72 Tex. 658, 13 Am. St. Rep. 843, the telegram was: "Mrs. Broesche is dead; will bring corpse on train to-night." It was sent for the benefit of the sender, and the court said it "was too obvious to require explanation."

The case of *Western Union Tel. Co. v. Kirkpatrick*, 76 Tex. 217, 18 Am. St. Rep. 37, has been cited by appellant. In that case, there was no mention of Mrs. Kirkpatrick, for whose benefit the suit was brought. The telegram was to her husband to come and bring Ferdinand, who was a brother of Mrs. Kirkpatrick; that his father was very low. It was held that a suit could not be maintained for injury to her feelings, as there was nothing in the telegram "to apprise the company either that plaintiff had a wife, or that she was at Highland station, or that the object of the communication was to afford information upon which she was expected to act."

We think that in this case the appellant was in the possession of information sufficient to make it within the contemplation of the parties that the telegram was sent for the benefit of Mrs. Nations, and was in effect an invitation to her son to come to her. Joseph Nations told the agent that it was important, and that he wanted it rushed through at once. Why, except for the benefit of the sender? And could not the mother rely on her son to come without a command or an invitation to do so? To us it appears that the appellant was in possession of sufficient information to make it reasonably apparent that the telegram was sent for the benefit of Mrs. Nations, and that it was an invitation to her son to come and be present with her.

Believing that the judgment of the court below should be affirmed, we so report.

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IN THE SUBSEQUENT CASE of *Potts v. Western Union Tel. Co.*, 82 Tex. 545, a prepaid telegram from a sister to her brother, announcing the fatal illness of her husband, was received by the defendant company at Detroit, Texas, to be sent to Sulphur Springs, Texas. The message was as follows: "To William McCann, Sulphur Springs, Texas. Come at once; Mr. Potts is not expected to live. Signed, M. E. Potts." The telegram was never delivered. Mr. Potts mentioned therein died three days after it was received and sent. Mr. McCann, to whom it was addressed, did not reach the sender, Mrs. M. E. Potts, until more than seven days after it was received by the telegraph company. In an action against the telegraph company for its negligence in failing to deliver the message, it was decided that the message on its face showed its

importance, charging the company with notice of whatever would have been developed by inquiry, and that the sender was entitled to recover damages for the mental suffering sustained by reason of her not having her brother with her during her deep distress at the death of her husband, all of which was caused by the gross negligence of the defendant company in failing to promptly deliver said message.

The following authorities were cited in support of the ruling: *Gulf etc. Ry Co. v. Levy*, 59 Tex. 542; 46 Am. Rep. 289; *Gulf etc. Telegraph Co. v. Richardson*, 79 Tex. 649; *Stuart v. Western Union Tel. Co.*, 66 Tex. 580, 586; 59 Am. Rep. 623; *Western Union Tel. Co. v. Moore*, 76 Tex. 66; 18 Am. St. Rep. 25; *Western Union Tel. Co. v. Adams*, 75 Tex. 531; 16 Am. St. Rep. 920; *Western Union Tel. Co. v. Feebles*, 75 Tex. 537; *Western Union Tel. Co. v. Broesche*, 72 Tex. 654; 13 Am. St. Rep. 843; *Western Union Tel. Co. v. Simpson*, 73 Tex. 422; *Western Union Tel. Co. v. Rosentreter*, 80 Tex. 406; *Eric Telegraph etc. Co. v. Grimes*, 82 Tex. 89.

**DAMAGES FOR MENTAL ANGUISH.** — In regard to this subject, there is a conflict of opinion in the several states. In Texas, which seems to have supplied most of the cases holding that such damages are recoverable apart from the infliction of any physical injury, the opinion of the court of last resort has been changed three times. In *So Rells v. Western Union Tel. Co.*, 55 Tex. 308, 40 Am. Rep. 806, it was decided that an action for mental suffering alone can be maintained. That case was overruled in *Gulf etc. Ry Co. v. Levy*, 59 Tex. 563; 46 Am. Rep. 278; but, as will be seen from the cases cited above, the original doctrine has again prevailed, and appears to be firmly established in the jurisprudence of the state: Compare *Hale v. Bonner*, 32 Tex. 33; *ante*, p. 850; *Crawford v. Doggett*, 82 Tex. 139; *ante*, p. 859. A similar doctrine has been enunciated in Tennessee and Indiana: *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695; 6 Am. St. Rep. 864; *Renihan v. Wright*, 125 Ind. 536; 21 Am. St. Rep. 249. In other states, the question seems to be still awaiting an authoritative settlement.

**THE GENERAL RULE** is, that mental suffering is not an element of damages, unless based on bodily injury, or unless the injury from which it results was attended by circumstances of malice, insult, or oppression: *Derrah v. Illinois Cent. R. R. Co.*, 65 Miss. 14; 7 Am. St. Rep. 629, and cases cited in note. A discussion of mental anguish as an element of damages will be found in the extended note to *West v. Western Union Tel. Co.*, 7 Am. St. Rep. 539.

## **WESTERN UNION TELEGRAPH CO. v. HOUGHTON.**

[32 TEXAS, 561.]

**TELEGRAPH COMPANIES — DUTY TO DELIVER MESSAGE ADDRESSED TO ONE PERSON IN CARE OF ANOTHER.** — Where a telegram is addressed to one person in care of another, the telegraph company must use reasonable care to find and deliver to the party addressed upon a failure to deliver to the party in whose care the message is sent, or it must respond in damages for its negligence in this respect, especially when the party addressed is well known at the place where the message is received for delivery.

**TELEGRAPH COMPANIES — DUTY TO DELIVER MESSAGE TO PARTY ADDRESSED.** — Where a telegram is addressed to one party in care of another, the



non-existence of the party in whose care the message is sent will not relieve the telegraph company of its duty to exercise reasonable care to find and deliver the message to the party addressed.

**VERDICT—WHEN EXCESSIVE.**—In actions where there is no fixed legal rule of compensation, the verdict of the jury is conclusive, unless it is influenced and misled by corruption, passion, or prejudice; and when the amount of the verdict is such as to shock a sense of justice, and must have been the result of passion or prejudice on the part of the jury, the judgment rendered in accordance therewith will be reversed as excessive.

**TELEGRAPH COMPANIES—DAMAGES FOR NON-DELIVERY OF TELEGRAM—WHEN EXCESSIVE.**—A verdict for four thousand five hundred dollars against a telegraph company for the non-delivery of a telegram from a mother to her husband relating to their son, and reading, "Lush is worse; come home," is excessive and should be set aside, although the father did not reach this son until after his death.

*A. H. Field*, for the appellant.

*W. R. and J. L. Camp, and H. Chilton*, for the appellee.

GARRETT, P. J., Section B. This was a suit for damages for failure to deliver the following telegram:—

"GILMER, TEXAS, January 13, 1889.

"MR. JOHN B. HOUGHTON, care Mr. Basall, Rusk, Cherokee County, Texas.

"Lush is worse; come home. LAURA HOUGHTON."

Lush was the child of John B. and Laura Houghton, who resided at Gilmer. The father was at Rusk at work as a carpenter, and boarded with a man by the name of Bouthwell, who kept a boarding-house about two hundred yards from appellant's office at Rusk. Houghton had requested his wife, in case it should be necessary, to address him in care of Mr. Bouthwell, but it seems that the name was misunderstood and erroneously written "Basall." There was no such person as Basall in Rusk.

Appellant admits that the message was sent to Rusk, and there held by appellant and not delivered.

There was a trial before a jury, which returned a verdict in favor of the appellee for \$4,500.25, for which judgment was rendered.

Some seven assignments of error appear in the record, but we think the case turns upon two questions: 1. Was the defendant's obligation promptly to deliver the telegram limited to such delivery to the person to whose care it was sent? 2. If not so limited, and the defendant is liable in this case in damages for failure to deliver to the plaintiff, was the amount of damages assessed by the jury excessive?

It is the duty of a telegraph company to make delivery of a telegram in due time to the proper person, and it is bound to due care and diligence in its undertaking. There is a *prima facie* obligation resting on the company to make an actual personal delivery without delay to the person to whom the message is addressed. If in the exercise of due diligence to find him the company's messenger is unable to do so, the company might perhaps be under obligation to keep the message at the office, and mail a notice thereof to the address of the person to whom it is sent. Defendant was under obligation to find the person to whom the message was directed, and would be liable for a negligent breach of this duty: Scott and Jarnigan on Telegraphs, secs. 180, 186, 187; Gray on Telegraphs, sec. 23.

There does not seem to have been any effort to find the plaintiff. The only evidence offered by the defendant to excuse its failure to deliver the telegram was that of M. N. Dial, who testified that he lived in Rusk in January, 1889, and was in the railway business; that he had lived near Rusk twenty-three years, and never knew "Basall"; that he knew Jack Bouthwell, but if he ever kept a boarding-house he did not know it. He was a clerk in the telegraph office, and could have delivered the message to Bouthwell, who lived two hundred yards from the telegraph office; that he did not know Mr. Houghton; and that Rusk was full of strangers at that time, going to New Birmingham, which was about one and a half miles from Rusk.

Plaintiff had been in Rusk about three or four weeks, working at the carpenter's trade. He was at work within two hundred yards of the telegraph office; and had been about the depot a good deal, and had spoken to the operator several times. His boarding-house was in sight of the office. He was very well acquainted in Rusk. He knew the sheriff, county clerk, and postmistress, and they also knew him. The hackmen and liverymen knew him, and he also knew them. His wife had relatives there. He had understood Bouthwell's name to be Basall. When he left home he told his wife to keep him posted in regard to the health of his family.

As the telegram was addressed to the care of another person than the addressee, a delivery to such person would have been a compliance with the obligation of the defendant: *Western Union Tel. Co. v. Young*, 77 Tex. 245; 19 Am. St. Rep. 751. This case is relied on by the appellant as authority for

limiting its obligation to deliver the telegram to the person to whose care it was addressed; but an examination of the facts will show them to be very different from those in the case under consideration. In *Western Union Tel. Co. v. Young*, 77 Tex. 285, 19 Am. St. Rep. 751, the telegram was delivered to W. R. Henry, a member of the firm of W. R. Henry & Co., to whose care it was addressed, and he declined to forward it to Mrs. Young, and handed it back to the messenger. This was held to be a delivery in compliance with the contract of the company. Plaintiff was the person to be benefited by the message, and defendant knew this, not only from the face of the message itself, but from information to its agent at Gilmer; and the effect of the address was to advise the defendant that a delivery to Basall would be sufficient in order to enable the plaintiff to get the message. But Basall could not be found. What, then, was the duty of the defendant? We think that the address indicated that the telegram was for Houghton, but that the duty of the defendant might be discharged by delivery to Basall as his agent. It will hardly be contended that the defendant would not have complied with its obligation if it had delivered the message to the plaintiff. An inland bill of lading, which described the goods, which in that case was a package of money addressed to the cashier of the Artisans' Bank, was held not necessarily to involve personal delivery to the cashier, but the liability of the carrier was held to be terminated by the delivery of the money to the clerk or receiving teller of the bank while he stood behind the counter in the discharge of his duties as teller: *Hotchkiss v. Artisans' Bank*, 2 Abb. 403, cited in note 2, *Wheeler on Carriers*, 33, and note.

Ordinarily the address of goods to the care of any one is an authority to the carrier to deliver them to such a party, and so discharge himself: *Schouler on Bailments*, 499. While in the case of common carriers this method of consigning may be sometimes resorted to in order to obtain payment for the goods before delivery, it is not the usual course; in the case of telegrams there could be no such reason, and such an address would constitute a mere agency on the part of the person to whose care the message was sent to receive it for the benefit of the addressee. He would not have the authority to open it, could derive no benefit from it, would not have the authority to detain it, and could only deliver it to the person

to whom it was addressed. With full knowledge of the contents of the telegram and the circumstances under which it was sent, the defendant would be bound to know that it was for the sole benefit of the person to whom it was addressed, and there could be no reason to restrict its liability for delivery to the person in whose care the message should be addressed. A specification in the address of a telegram of the house or business office of the person to whom the message is directed is simply an assistance in making a personal delivery; and the company is not necessarily absolved by it from making further effort to find that person, in case it does not find him at the particular place described. If by reasonable effort it can find him elsewhere, or by waiting at or returning to that place it can deliver the message to him or to his agent for that purpose, it is under an obligation to do so: Gray on Telegraphs, sec. 23. Suppose the person to whose care the message is addressed is out of town, and that the person for whose sole benefit it is can be found by the slightest inquiry,—is well known,—would it be proper to absolve the company from making any effort to find the person to whom the message is directed? Rusk was a small town of not more than three or four hundred inhabitants. Plaintiff was well known, and had relatives there, and it seems that the slightest inquiry would have enabled the defendant to deliver the message to him. Under the circumstances in this case, it was clearly the duty of the defendant to use reasonable care to find the plaintiff and deliver the message to him.

Was the verdict for \$4,500.25 excessive? In actions where there is no fixed legal rule of compensation, the theory of the law is, that the decision of the jury is conclusive, unless they have been misled, or their verdict has been influenced by corruption, passion, or prejudice. The amount of the verdict in this case is such as to shock a sense of justice, and must have been the result of passion or prejudice on the part of the jury. Because the amount of damages awarded is excessive, the judgment of the court below should be reversed.

The remaining assignments of error all relate to the refusal of the court to give special charges requested by the defendant. As all the points to which they were addressed were properly charged upon by the court, there was no error in refusing them.

We report the case for reversal.

**Telegraph Corporations, Duty of, to Find Person Addressed.\***

**Diligence Exacted.** — The delivery of a message received by a telegraph company to the party addressed is part of the contract for transmission. A message not delivered is not transmitted: *Western U. Tel. Co. v. Gougar*, 84 Ind. 176. The company must, therefore, use reasonable diligence to find the person to whom the telegram is addressed, for the purpose of delivering it to him: *Western U. Tel. Co. v. Cooper*, 71 Tex. 507; 10 Am. St. Rep. 772; *Pope v. Western U. Tel. Co.*, 9 Ill. App. 587; *Western U. Tel. Co. v. Lindley*, 62 Ind. 371. It is not enough to attempt a delivery only at the office or place of business of the person addressed: *Pope v. Western U. Tel. Co.*, 9 Ill. App. 587; especially when he, as well as his place of residence, is well known in the town where the message is received: *Western U. Tel. Co. v. Cooper*, 71 Tex. 507; 10 Am. St. Rep. 772. An attempt to deliver a message after business hours, or on Sunday, will not excuse a failure to deliver: *Western U. Tel. Co. v. Lindley*, 62 Ind. 371; where it was said that "the unsuccessful attempts of the company's agent to deliver said message at the business house of Arthur Peter & Co. (to whom it was addressed) either on Saturday night, after the close of business hours, or on Sunday, when there are not or should not be any business hours, certainly afforded no reasonable excuse for the non-delivery of, or for want of an effort to deliver, the said message during business hours of the succeeding Monday."

In *Western U. Tel. Co. v. Gougar*, 84 Ind. 176, it appeared that a message was received for a Mrs. Balch, who "then lived, and for a year last past had lived, on Christian Ridge, in the suburbs of Frankfort, and about three fourths of a mile from the defendant's telegraphic station in Frankfort. She was known as a temperance lecturer there. She had been talking of moving to another residence, but had determined not to move. The defendant's manager at the station had heard that she intended to move, and he told the messenger that she had moved, or that he thought she had moved, and that if, upon inquiry, he should be directed to her former residence he need not go there. The messenger, a boy seventeen years old, inquired of eight or ten persons, some of whom told him Mrs. Balch lived on Christian Ridge, and some that she had moved from that residence, and he came back without going there; he started out again, and again was told that she lived or had lived on Christian Ridge; he did not find her, but he did not go to Christian Ridge to inquire. The next morning, on further inquiry; he was told the same, but still did not go to Christian Ridge to inquire. At 2 o'clock, P. M., he took the message to Blue Ribbon Hall, and there inquired; somebody told him Mrs. Balch lived, as he thought, on Christian Ridge; he then left the message with the janitor of Blue Ribbon Hall, from whom Mrs. Balch, when she came to the hall, received it, twenty-two hours after it had reached Frankfort, and too late to accomplish its object." On this state of facts, the court decided that the company did not use due diligence to find the person addressed, and was liable for its failure to sooner deliver the message. Where the person to whom the message was sent had resided in the same house within one mile of the telegraph office where the message was received for the period of six years, the mere fact that the messenger of the telegraph company made an ineffectual attempt to find the addressee, and inquired where he might be found without success, is no defense for a failure to deliver the telegram:

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\* REFERENCE TO MONOGRAPHIC NOTES.

Telegraph companies, liability and damages for failure to deliver messages: 10 Am. St. Rep. 773-790.

*Western U. Tel. Co. v. McKibben*, 114 Ind. 511. So where the company contracted with a party who expected to receive a message to deliver the message, if received, at his residence, and declined to take pay in advance for the services to be rendered, the fact that the company received the message, but made no effort to find the party addressed, or to deliver the telegram to him at his residence, renders it liable to him for its negligent failure to deliver the message: *Milliken v. Western U. Tel. Co.*, 110 N. Y. 402.

*Failure of Definite Address.* — When a telegraph company pursues its usual and practical method as to the delivery of a message, and leaves it according to the address, upon being informed that the addressee lives there, it is not guilty of negligence, even if it appears that the addressee does not live there, but lives at the same number on a street to which the same name as that mentioned in the message applies; as where the message is addressed to 291 Rampart Street, and is delivered at that number on North Rampart Street, upon information that the addressee resides there, instead of being delivered at that number on South Rampart Street, where the addressee in fact resides: *Deslottes v. Baltimore and Ohio Tel. Co.*, 40 La. Ann. 183.

If the sender of a message directs it to Mrs. La Fountain, Kankakee, a place of twelve or fifteen thousand people, and fails upon request to make the name of the addressee more definite, or to give the street and number of her residence, he is guilty of such contributory negligence as will prevent him from recovering for the failure of the company to deliver the message: *Western U. Tel. Co. v. McDaniel*, 103 Ind. 294.

*Unrepeated Message.* — If the blank upon which a message is sent contains a condition that the company will not be liable for delays in delivery or for non-delivery of any unrepeated message, whether caused by the negligence of its servants or otherwise, beyond the amount received for sending the same, the sender of an unrepeated message on a blank containing such condition can recover only the cost of sending it in an action against the company for delay in its delivery, caused by the gross negligence of the company's messenger in failing to find the addressee, and to deliver the message to him or at his place of abode to which it was directed: *Clement v. Western U. Tel. Co.*, 137 Mass. 463.

*Free-delivery Limits.* — Where a telegraph company has established reasonable free-delivery limits, notice of which is given in its blanks, it is incumbent on the sender of a message to ascertain whether or not the addressee resides within the free limits, to make provision for delivery if he lives beyond them, and to notify the sending operator of the fact. If a message is handed in for transmission without explanation, the presumption is that the addressee lives within such free-delivery limits, and the sender takes the risk of delivery. In such case the transmitting operator need only send the message accurately, and with proper diligence, and the receiving operator need only copy it correctly and deliver it promptly if the addressee lives within such free-delivery limits, and the burden of proof is on the sender, in an action against the company, to show that the person addressed resided within such limits at the time the message was received by the terminal operator, before the company can be held liable for a failure to find the addressee, and promptly deliver the message to him: *Western U. Tel. Co. v. Henderson*, 89 Ala. 510; 18 Am. St. Rep. 148. In *Western U. Tel. Co. v. Lindley*, 62 Ind. 371, it was decided, however, that in an action to recover for a failure to deliver a message, the fact that the person to whom it was addressed did not live within the specified distance from the telegraph office to which it was sent is matter of defense, and must be pleaded by the company.

**Delivery to Other Person than Addressee.** — When a telegram is received and sent, directed to one person in care of another, the liability of the company ends with the delivery of the message to the person to whose care it is sent: *Western U. Tel. Co. v. Young*, 77 Tex. 245; 19 Am. St. Rep. 751. A telegram may properly be delivered at the hotel where the addressee resides when he is not found at his place of business because of his absence from town; and the failure of the hotel clerk, with whom the message is left, to deliver it to the addressee, will not render the company liable: *Western U. Tel. Co. v. Trissal*, 98 Ind. 566. If the company, after exercising due diligence, fails to find the person to whom a message is addressed, a delivery of the telegram to his wife, with information to the sender, is sufficient: *Given v. Western U. Tel. Co.*, 24 Fed. Rep. 119. But where a message, addressed to "T. W. Pearsall & Co.," is delivered at the office of that firm, in an envelope addressed "T. W. Pearsall," this is not a performance of duty by the company, but is *prima facie* evidence of negligence on its part: *Pearsall v. Western U. Tel. Co.*, 44 Hun, 532.

**Burden of Proof** is on the telegraph company to excuse its failure to make a delivery to the addressee named: *Pope v. Western U. Tel. Co.*, 9 Ill. App. 587. The fact that the person addressed was not at his office, and could not be found, so that the message could be delivered to him, is matter of defense which must be shown by the company: *Western U. Tel. Co. v. Cooper*, 71 Tex. 507; 10 Am. St. Rep. 772; and any information received by the telegraph messenger at the office of the addressee as to his whereabouts is admissible to show that he was not at the time at the place to which the message was sent: *Western U. Tel. Co. v. Cooper*, 71 Tex. 507; 10 Am. St. Rep. 772.

**Insufficiency of Service.** — The fact that the business of a particular telegraph office is insufficient to justify the employment of a separate operator or messenger to deliver messages does not excuse the company from liability for failure to find the addressee and deliver a message received at that office: *Western U. Tel. Co. v. Henderson*, 89 Ala. 510; 18 Am. St. Rep. 148.

**Diligence, whether Question of Law or Fact.** — In Texas, the question as to whether or not the telegraph company has exercised reasonable diligence to find the addressee, and to deliver the message, is always a question of fact, under the circumstances of each particular case, of which the jury are the exclusive judges: *Western U. Tel. Co. v. Cooper*, 71 Tex. 507; 10 Am. St. Rep. 772; and while the question of the negligence of the company in failing to deliver a message may ordinarily be a question of fact for the jury, when the evidence is so conflicting that fair-minded men may differ as to the conclusion to be reached from it, yet when the facts are admitted or undisputed, the court may determine the question of negligence as a question of law, according to the weight of the authorities: *Milliken v. Western U. Tel. Co.*, 110 N. Y. 403; *Deslottes v. Baltimore and Ohio Tel. Co.*, 40 La. Ann. 183; *Western U. Tel. Co. v. McKibben*, 114 Ind. 511; *Western U. Tel. Co. v. Lindley*, 62 Ind. 371; *Western U. Tel. Co. v. Trissal*, 98 Ind. 566.



## INTERNATIONAL AND GREAT NORTHERN RAILWAY COMPANY v. McRAE.

[32 TEXAS, 614.]

**COMMON CARRIERS OF LIVE-STOCK — DUTY TO FEED AND WATER IN EVERY KIND OF WEATHER.** — A railway company carrying live-stock must provide suitable places where they can be fed and watered in every kind of weather, without injury, so far as this can be done by the use of proper care. For a failure to perform this duty, it must respond in damages; nor will its liability be excused by the muddy condition of its feeding-places, caused by recent rains.

**COMMON CARRIERS OF LIVE-STOCK — EVIDENCE OF CONTRACT IN REDUCTION OF DAMAGES.** — A written instrument signed by a shipper of live-stock and the conductor of the train, and also by an attesting witness, showing the condition of the live-stock at its date, is inadmissible in evidence until it is proved by such attesting witness, or his absence is accounted for. Until then, the evidence of such conductor as to its contents is also inadmissible, for the purpose of reducing damages.

*Gould and Camp*, for the appellant.

*Greenwood and Greenwood*, for the appellee.

**STAYTON, C. J.** This action was brought by appellee to recover damages on account of alleged injuries to horses shipped by him over appellant's railway, cause by alleged negligence and wrongful act on the part of the railway company or its servants, and resulted in a judgment for \$1,045 in favor of plaintiff.

Among other grounds for damages, it was claimed that the stock-pens at Palestine, a place where it was necessary to feed the horses, were in such condition that this could not be done, and that the pens were so muddy that the horses were injured from that cause while in the pens. There was evidence tending to sustain these averments, and the court gave a proper charge on that branch of the case; but it is claimed that the court erred in refusing to give a charge requested by appellant, which was as follows: "You are further instructed that if the pens defendant furnished plaintiff's stock at Palestine were good and suitable in ordinary good weather, but were muddy by reason of recent rains, then defendant would not be responsible for damages resulting from the condition of said pens."

The law makes it the duty of all common carriers "who convey live-stock of any kind to feed and water the same during the time of conveyance, . . . unless otherwise provided by special contract": Rev. Stats., art. 284; and if the cars in which they are transported be not so constructed that this

may be done without unloading, then it becomes the duty of a railway company carrying such stock to provide places where they may be unloaded, watered, and fed without injury; and it is not enough that the places so prepared may be "suitable in ordinarily good weather," for such freight must be transported during bad weather as well as good, and it is the duty of the carrier to provide places where this can be done in any kind of weather without injury to the stock, so far as this can be done by the use of proper care.

There was evidence tending to show that much of the injury to the horses occurred before they left Palestine, and on the trial defendant offered to introduce in evidence a paper signed by plaintiff at Longview, a place beyond Palestine, showing that when the horses reached Longview only two or three of them were injured, and that the others were in good condition. The bill of exceptions shows that this paper was signed by the conductor on appellant's train, as well as by plaintiff, and that it was also signed by another person as a witness. Defendant proposed to prove the execution of the paper by the conductor, and also to prove the same facts by him that were shown by the paper; but plaintiff objected to this evidence, on the ground that the execution of the paper was not proved by the person who signed it as a witness, and this evidence was excluded, as was that of the conductor offered to prove the same facts. This ruling of the court is assigned as error.

The general rule is, that the execution of instruments having subscribing witnesses must be proved by such witnesses, or good reasons shown why this cannot be done, and this rule has been applied to instruments not evidencing contracts, such as notices to quit, receipts, and like papers: *McMahan v. McGrady*, 5 Serg. & R. 314; *Heckert v. Haine*, 6 Binney, 16; *Doe v. Durnford*, 2 Moore & S. 64; *Higgs v. Dixon*, 2 Stark. 181. Such we must concede to have been the rule at common law as practiced in England on December 20, 1836, when the statute was passed making the common law of England as there practiced applicable to evidence. This rule was kept in force when the Revised Statutes were adopted, and has not since been changed; but it might be worthy of the consideration of the legislature whether such a rule ought to be applied in any case in which the law does not require an instrument to be authenticated by attesting witnesses. In England we understand the rule to have been so changed by statute as to render it unnecessary to call attesting witnesses in any case in which

the law does not require such instrument to be so attested: Best on Evidence, 221. While this does not affect the question before us, it tends to show that a people so conservative as the English have recognized the fact that the unrestricted rule itself was hurtful, or that the courts in its application had carried it beyond its original purpose to a point not consistent with or not necessary to the proper administration of justice. The paper is not before us, but the bill of exceptions shows that the company required the conductor as well as the shipper to sign such papers, and that it required the signatures of those persons to be witnessed by another. The reason why it was required of the shipper doubtless was to have an admission from him as to the condition of his stock at given points, and the inference is, that the statement by the conductor was required in order that upon any change of conductors the company might know the condition of the shipment at the point where one conductor ceased to have control of it and turned it over to another. Such information might be valuable as an admission and in many other ways to a railway company; and when under its rules the admissions of the shipper and conductor are required to be in writing, attested by a third person, and are so made, then we are of opinion that it is necessary to prove the instrument containing such admissions by the testimony of the subscribing witness, unless facts are shown which excuse this. No effort is shown to have been made to prove the execution of the instrument by the subscribing witness, nor was it shown that his evidence might not be obtained; and under this state of facts the court did not err in excluding the instrument nor in excluding the testimony of the conductor in so far as it related to what it was contained in it.

The evidence introduced to show the amount of damages plaintiff was entitled to was of the character to which parties must necessarily resort in such cases, was relevant, and was such as would have justified a larger verdict, and the court did not err in admitting it.

The judgment was against the defendant railway company; but it coming to the knowledge of the court in some way that its property was in the hands of receivers, the court directed that the judgment be certified to the court having control of the receivership for payment, and provided that execution should issue against the company in the event it was put in possession again of its property before the judgment was satisfied.

So much of the judgment as suspended plaintiff's right to an execution, and required the judgment to be certified for settlement to the court controlling the receivership, may have been unauthorized; but this is not a matter of which appellant can complain, and appellee does not.

We find no error, and the judgment will be affirmed.

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**RAILROADS — CARRIERS OF LIVE-STOCK — DUTY TO FEED AND WATER.** — A custom requiring a shipper to go on the same train with his stock, to feed and water it, cannot be sustained because the law imposes this duty on the carrier, and he cannot transfer it to the shipper by custom: *Missouri Pac. R. R. Co. v. Fagan*, 72 Tex. 127; 13 Am. St. Rep. 776, and note. It is negligence *per se*, according to section 4386 of the United States Revised Statutes, for a railroad company to keep live-stock on their cars more than twenty-eight consecutive hours without unloading them for rest, water, and food, and the fact that the company's stock-yard was on fire upon the arrival of the train will not excuse it for not furnishing the proper facilities to the person in charge for caring for them: *Nashville etc. R'y Co. v. Haggis*, 86 Ga. 210; 22 Am. St. Rep. 452, and note. See extended note to *Clarke v. Rochester etc. R. R. Co.*, 67 Am. Dec. 206, discussing the liability of carriers of live-stock.

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## TEXAS AND PACIFIC R'Y CO. v. ROBERTSON.

[32 TEXAS, 657.]

**EVIDENCE — RES GESTÆ DECLARATIONS MADE SUBSEQUENT TO ACCIDENT.**

— The declarations of one injured in a railway accident, as to its cause, made at the place within a few minutes after it occurred, are admissible as part of the *res gestæ*.

**NEGLECT — QUESTION OF FACT.** — When, in an action against a railway company to recover for the death of a brakeman, alleged to have been caused by a defective brake-beam and switch, the evidence in support of the allegation is conflicting, the question of the negligence of the company and the contributory negligence of the deceased is properly left for consideration and determination by the jury.

**CONTRIBUTORY NEGLIGENCE — UNCOUPLING MOVING CARS.** — The fact that a brakeman is injured while attempting to uncouple moving cars does not of itself establish negligence contributing to his injury, when the evidence shows that this is a usual and often necessary practice, and fails to show that it could not have been done without injury but for other defects in the road-bed of such nature as were likely to make a brakeman stumble and fall.

**NEGLECT — LIABILITY FOR INCOMPETENCY OF EMPLOYER.** — Where, in an action to recover for an injury to a railway brakeman, caused by a defective track, and received while he was attempting to uncouple cars, the evidence shows that the employee to whom the railroad company confided the duty to keep its track in repair was incompetent, and fails to show that such brakeman knew of its defective condition at the time and

place of the accident, the negligence of the company is established, and a recovery may be had for the injury.

**DEATH OF PARENT — UNBORN CHILD MAY RECOVER FOR.** — A child unborn at the time of the negligent killing of its parent in the employ of a railway company is entitled to recover damages therefor as a surviving child.

*F. H. Prendergast*, for the appellant.

*P. H. Russell and O. A. Culberson*, for the appellees.

STAYTON, C. J. T. B. Robertson having been killed while in the employment of appellant as a brakeman, this action was brought by his mother, wife, and children, to recover damages resulting from his death, which it is alleged resulted from the negligence of the railway company. The evidence, other than the declarations of the deceased hereafter to be referred to, showed that he was injured while attempting to uncouple moving cars.

A witness was permitted to state that he "was about fifty or sixty yards from Robertson when he was hurt, and I heard Robertson halloo, and I ran immediately to him and reached him before they got him out from under the tender. He was fully conscious. I was about the first to reach him, and he then and there stated that he was uncoupling the car from the engine, and just as he pulled the pin he stumbled, and the brake-beam caught his foot and threw him across the rail."

This evidence was objected to, on the ground that it was hearsay, and not part of the *res gestæ*; but the objection was overruled, and this ruling is assigned as error.

It may be that the admission of such evidence is hard to reconcile with the principles of evidence, and could we deem it an open question, the writer would be inclined to reject it; but the great weight of American authority is in favor of its reception, and the former decisions of this court are on the same line. The question was considered at the present term, and such evidence held admissible in the case of *Railway v. Anderson*, wherein authorities bearing on the question are cited. The circumstances under which the declarations in question were made were such as to almost preclude the belief that any self-serving purpose prompted them, and we cannot hold that it was error to receive the evidence.

There was evidence tending to show that the brake-beam was not in good order, and that it came nearer to the rails than it should have been, but there was some conflict as to this.

The averments of negligence on the part of the railway company on which plaintiffs based their right to recover contained the following: "That while the said T. B. Robertson was, in the regular and proper and careful discharge of his duties, uncoupling a car from the tender of the engine pulling the freight train upon which said Robertson was employed as aforesaid, at night, on said January 12, 1889, and while said Robertson was passing carefully from between said tender and said car, the spikes in the frog-brace, which were then and there out of order, dangerous, and unsafe, tripped the said Robertson, and the brake-beam of said tender, which was old, out of order, and dangerous, and unsafe, caught the foot of said Robertson, and threw him down, and held him so that the wheels of said tender and car passed over the body of said Robertson, and cut off both his legs, and cruelly killed him as aforesaid." It was further alleged that his death was caused by the negligence of the appellant and its employees, in that "said cars, tender, track, road-bed, frog, switch, frog-brace, brake-beam of the tender, and the guide-rails at the place where said injuries were inflicted upon said Robertson were each and all old, out of order, dangerous, and unsafe; that the section foreman of said section at that time was incompetent and unfit; that all these things caused and contributed to said injuries; that the unsafe and dangerous condition thereof was wholly unknown to said Robertson; that the incompetency and unfitness of said foreman were unknown to said Robertson; and that defendant and its agents and employees had full knowledge of all these things, and might have known the same by the exercise of legal and proper care."

Lee Whitworth, who was by occupation a track foreman, testified: "Shortly after Robertson was injured I examined the part of the track where he was injured. There were there side-tracks, frogs and frog-braces, and guide-rails. I found the spikes and frog-bolts in an unsafe condition by the spikes being up from the rails and frog-bolts extending out too far from the frog, making it unsafe for trainmen, and liable to trip and throw them. . . . I examined the track a short time after the accident. I made the examination to find out the condition of the track, as he, deceased, had said he stumbled on something. He said this just after the injury."

T. R. Walker, after stating that he was the first to reach deceased when under the tender, said: "Early the next morning I went up to where Robertson was injured, to examine the

track to see what made him stumble. I found blood and small pieces of his clothing and bones on the track where he was run over, and right at that place was a frog-brace, spikes, and guide-rails; the spikes around and in the frog-brace were not driven over half up, being about two and three inches above the tie, and two of the bolts connecting the rails projected about three inches from the top, or not inside the brace between the rails, rendering it very unsafe for employees on the track, and liable to cause any one to stumble and fall."

The evidence thus standing, defendant requested the court to give the following charge: "The jury are charged that there is no sufficient evidence to justify them in finding for plaintiff on the ground that the brake-beam was defective. You will therefore not consider any effect the brake-beam may have had."

The refusal to give this charge is assigned as error, but we are of opinion that the court did not err in this. It would not have been proper for the court to pass upon the question of fact, and to withdraw it from the consideration of the jury, when there was evidence tending to show that the brake-beam was not in proper condition; and if this were not true, in view of the evidence showing such defects in the construction of the road at the place the accident occurred as were shown, these being such as were likely to cause the brakeman to stumble and fall, it would have been improper to withdraw from the jury the consideration of any defects that with others brought about the injury, even if it had been shown that the particular defect would not alone have caused it. Whether the brake-beam was defective, and whether this alone or with other defects was the cause of the injury, was for the jury.

There is but one objection urged to the charge given by the court, and that is, that "the court erred in the seventh section of the charge, in allowing the jury to find for plaintiff on account of a defective brake-beam, because there was no evidence that the brake-beam was defective, nor that the defect, if any, caused the injury."

The evidence bearing on the condition, so far as necessary to state it, is as follows: Hunnicutt, who testified for appellee, said: "I was in the employ of defendant on January 12, 1889, and my duty was to make and repair brake-beams to engines and tenders. The standard height of a brake-beam is nine inches from the top of the rail when new and empty, but when the tender is loaded it will come down to seven or seven



and one half inches. . . . When they get below seven inches high they are repaired."

Walker testified that "since my employment with said company [appellant] I have measured a good many brake-beams to engine-tenders, and have always found same to measure not less than nine inches nor any more than fourteen inches high above the rails."

The witness Kelley, who testified for appellant, on cross-examination said: "We measured the brake-beam about two hours after Robertson was hurt. We measured from the top of the rail to the bottom of the brake-beam with a stick, and I measured the stick with my hands, and we decided from that that it was about five inches from top of rail to bottom of brake-beam."

Fuller, the engineer, testified that at the time of the injury the brake-beam was seven and one half inches above the rail.

The charge of the court properly permitted the jury to consider whether or not the brake-beam was defective, and whether that caused the injury, for there was evidence tending to show that it was defective, and that this defect may have caused or contributed to the injury.

It is urged that "the court erred in overruling motion for a new trial, because the evidence did not show what it was that caused T. B. Robertson to fall. The evidence did not show any negligence on the part of the defendant that caused the injury to Robertson." And further, that "the court erred in not granting a new trial, because the verdict is contrary to the evidence, in this: The evidence showed that T. B. Robertson went in between the engine-tank and a car to uncouple them while the cars were moving four miles per hour, at night, at a point where the side-track, guard-rails, and switches and frogs of the switch were, and that he stumbled and fell, without any fault of defendant."

The evidence showed that the deceased was uncoupling a car; that he entered between the cars while in motion for that purpose; that the track was in bad condition at the place in respects which were likely to bring about just such a result; even if we discard all evidence tending to show that the brake-beam was not in proper condition, and looking to the entire evidence, it cannot be said that there was not sufficient evidence to show how the injury occurred, and what caused it. The court instructed the jury as to the degree of care it was

incumbent on deceased to have used to entitle appellees to recover, and the evidence showed that it was usual and often necessary for brakemen to enter between moving cars for the purpose of uncoupling them, and it does not appear that this might not have been done without injury but for the defects pointed out by the witness, which were such as were likely to cause a brakeman to stumble and fall. It is shown that the person to whom the company confided the duty to keep the track in order was incompetent, and it was not shown that deceased knew of its defective condition when and where he attempted to uncouple cars and lost his life.

It cannot be said that the evidence shows a case in which the railway company was free from negligence, which was probably the direct cause of the accident; nor can it be said that the facts show a case in which, as matter of law, deceased was guilty of such negligence as would have precluded a recovery by him had he lived; and on all these questions the jury passed under a charge not complained of, and with evidence upon which they might reasonably find that the injury resulted from a cause that would fix liability on appellant; and we cannot reverse the judgment on the ground that a new trial should have been granted on the grounds referred to.

It is claimed that the verdict was excessive, and that for this reason a new trial should have been granted. The verdict was for ten thousand dollars. Deceased was a man forty years of age, in good health, an experienced railway man, who had held higher positions in such service in another state than he was holding at the time of the injury. He was receiving only seventy-five dollars per month as brakeman when injured; but with capacity to fill higher positions in railway service, this cannot be made the measure of appellees' loss, for if competent and faithful, it might be reasonably expected that he would have been promoted to higher service with increased compensation.

One of the plaintiffs was unborn at the time of the death of the father, and it is contended that under the statute this child, to whom two thousand dollars was awarded, was not entitled to recover, because not within the meaning of the law a "surviving child." Looking to the purpose of the law, there can be no question of the right of such a child to recover, and so it was held under the English act known as Lord Campbell's act, and so it has been held in this state: *Nelson v.*

*Galveston etc. R'y*, 78 Tex. 621; 22 Am. St. Rep. 81; *Missouri Pac. R'y Co. v. Lehmborg*, 75 Tex. 67.

Finding no error, the judgment will be affirmed.

**EVIDENCE — RES GESTÆ — DECLARATIONS MADE SUBSEQUENT TO ACCIDENT.** — Declarations made by an injured passenger immediately after an accident, and while he was still lying in the place where he received the injury, are admissible as a part of the *res gestæ*: *Pennsylvania R. R. Co. v. Lyons*, 129 Pa. St. 113; 15 Am. St. Rep. 701, and note; *Leahey v. Cass Ave. etc. R'y Co.*, 97 Mo. 165; 10 Am. St. Rep. 300, and note; note to *Hinchcliffe v. Koontz*, 16 Am. St. Rep. 407. See also note to *International etc. R'y Co. v. Anderson*, *ante*, p. 907.

**NEGLIGENCE, WHEN A QUESTION FOR THE JURY:** See *Carter v. Oliver Oil Co.*, 34 S. C. 211; *ante*, 815, and note. Where the evidence is conflicting, it is for the jury to determine the question of the negligence of the company, and the contributory negligence of the person injured: *Hinkle v. Richmond etc. R. R. Co.*, 109 N. C. 472; 26 Am. St. Rep. 581, and note.

**NEGLIGENCE CAUSING DEATH OF FATHER, RIGHT OF POSTHUMOUS CHILD TO RECOVER FOR.** — A posthumous child is entitled to recover damages for the death of his father, resulting from injuries inflicted through the negligence of a railroad company, under a statute giving to the "surviving children" a right to maintain an action in such a case: *Nelson v. Galveston etc. R'y Co.*, 78 Tex. 621; 22 Am. St. Rep. 81, and note.

**RAILROADS — INJURY TO BRAKEMAN.** — A railroad company is answerable to any one of its servants operating its road for the negligence of one of its officers or servants whose duty it is to keep it in a reasonably safe condition, and who culpably fails to do so, or to give notice or warning thereof: *Kansas City etc. R. R. Co. v. Kier*, 41 Kan. 661; 13 Am. St. Rep. 311, and note. It is negligence in a railway company to leave holes between the cross-ties on its track after being warned of the danger, and a car coupler in their employ who is injured thereby without negligence on his part may recover; but if the evidence as to his contributory negligence is conflicting, the question of negligence is one for the jury: *Missouri Pac. R'y Co. v. Jones*, 75 Tex. 151; 16 Am. St. Rep. 879, and note.

## CONNALLY v. LYONS.

[32 TEXAS, 634.]

**TRUSTS — PERSONAL LIABILITY OF TRUSTEES.** — BENEFICIARIES of a trust are not necessary parties to a suit for a debt incurred by the trustee in the management of the trust, and for which he is personally liable.

**TRUSTS IN MERCANTILE BUSINESS — PARTNERSHIP.** — A trust, and not a partnership, is created when a trustee appointed by a court has the entire control and sole management of a mercantile business, for the benefit of the beneficiaries named in the instrument creating the trust, without any right on their part to withdraw their interests.

**TRUSTS — PERSONAL LIABILITY OF TRUSTEE.** — A trustee who carries on a mercantile business with the trust assets, for the benefit of the cestui que

trust, is responsible to the trust creditors, not only to the extent of the trust assets, but also with his own property.

**TRUSTS — PERSONAL LIABILITY OF TRUSTEE.** — A trustee who carries on a mercantile business with the trust assets, for the benefit of the cestui que trust, is personally liable for goods purchased by him and charged to the trust without first establishing the account as a debt against the trust estate, nor are the beneficiaries necessary parties to the suit.

**ACTION by Lyons & Co. against Nathan Connally, personally, to recover for certain goods sold to the firm of Connally & Co. at his request.** Defendant demurred, on the ground that there was no allegation that Connally & Co. were insolvent, unable or unwilling to pay, that there was a want of proper parties, and that the account was barred by the statute of limitations. The demurrer was overruled, and judgment rendered for the plaintiffs. On February 25, 1875, M. A. T. Connally executed an instrument in writing, reciting, in effect, "that in consideration of the fact that my success in business is principally owing to the efforts and assistance of my father, C. P. Connally, as well as those of my brothers, Drury A. Connelly and Nathan Connally, . . . and in and for the further consideration of the natural love and affection I have for and bear to my said father and all my brothers, to wit, Drury A. Connally, Nathan Connally, Commodore P. Connally, Jr., David M. Connally, Lafayette T. Connally, James H. Connally, and Edgar Connally, I hereby sell, transfer, and convey in absolute sale, except the one ninth of the amount of the same which I reserve for myself and subject to my control, all my right, title, and interest in and to the goods, wares, and merchandise which I now have on hand, as well as moneys, notes, claims, and accounts due me and growing out of and with my said mercantile business carried on in Sulphur Springs, together with the lot of land and storehouse erected thereon, and which I am now occupying in my said business [reference is here made to record-book for full description], all of which amounts to the sum of \$13,455.83, and said property as aforesaid, and described as aforesaid, I now, in consideration as aforesaid, turn over and deliver to my said father, the said C. P. Connally, in good faith, being wholly out of debt at this time. I do so, however, in trust, except as hereinafter set out, as follows: Said sum of \$13,455.83 is now by me divided into nine equal shares, each share amounting to the sum of \$1,495.09; the whole amount is still to be kept together and undivided, except as hereinafter provided, and my said father, C. P. Connally, is hereby appointed trustee of said fund, and is to con-

tinue said sum and its increase in amount, if any there be, in active and constant operation in the business heretofore by me pursued, to wit, merchandising, and in his own name, or in such name and style as he may prefer, and is to keep correct accounts of all gains and losses, so that at the end of each year he can, by his balance-sheet, correctly show how said business stands. The one-ninth part of the amount here by me transferred or assigned to my said father is transferred to him in absolute and unconditional sale, together with its increase. One-ninth part thereof, with its increase, in case the said sum should by his management be increased, is reserved for myself, and he is to turn over the same to me whenever I or my assignee or legal representative shall demand of him so to do. The other seven ninths and its increase shall go to the support and maintenance and education, or as much thereof as may, in my father's estimation, be necessary for that purpose, of my brothers, whose names I have already herein given. Any of my grown brothers, and when they shall become grown, who will remain with my said father, the said trustee herein, and assist him for reasonable wages, such as he may contract to give them, are to be boarded out of said fund, but not otherwise. When and after each of my seven brothers shall become of twenty-five years of age, my said trustee shall advance and pay over to him his *pro rata* of the amount then on hand, and said trustee may advance and pay over said *pro rata* share to any one when he thinks safe and prudent to do so, even before he arrives at the age of twenty-five years, and especially so if he seem inclined to attend energetically to any species of business, and prosper in said business; but no amount under this condition is to be advanced before the age of twenty-five years for uncertain or prodigal purposes. I mean, by his *pro rata* above set forth, the one-seventh interest of the brothers' interest or part at the time the advancement was made, and without regard to the amount now transferred. The advancement when so made must be taken by said brother in full payment of his portion, without recourse on the main fund for further advancement. A final settlement shall not be demanded nor had, nor shall any of the beneficiaries of the trust herein created force by law or equity a final settlement by trustee, till my youngest brother Edward shall arrive at the age of twenty-five years, or in case of his death, till the period of time when he would be twenty-five years of age if alive. My father, the said trustee, shall not, under any

circumstances, be required to give bond to faithfully carry out the trust herein created. I trust only to his integrity to do so; and I further provide that said trustee, my father, the said C. P. Connally, shall, for his services in faithfully carrying out this trust, and for his services in managing said mercantile business, have and receive one thousand dollars per annum of and out of said fund here conveyed in trust as above set forth. Witness my hand," etc. The trial court found that C. P. Connally accepted such trust, and executed the same until his death; and that thereafter, on March 24, 1882, Nathan Connally was appointed trustee under said trust by a court of competent jurisdiction; and that he accepted and continued to execute said trust, and to carry on said mercantile business under the name of Connally & Co. until January 20, 1886, when it was attached by creditors, including plaintiffs, for debts amounting to \$31,121.39, while its assets amounted to \$20,000, and that on January 16, 1886, defendant withdrew the deposits of Connally & Co. from the bank, amounting to \$4,286. That during July, August, and September, 1885, the plaintiffs, Lyons & Co., sold and delivered to Connally & Co. goods to the amount of \$6,082.14 on credit, no part of which was ever paid. The conclusions of law are sufficiently stated in the opinion.

*E. B. Perkins, and Whittle and Son, for the appellant.*

*E. C. McLean, for the appellees.*

GARRETT, P. J., Section B. Appellant's first, second, and eighth assignments of error raise the question of parties as presented by his exceptions to the petition, but only on the ground that the persons who were claimed to be necessary parties were such as beneficiaries in a trust, and not as partners. If Connally & Co. were a partnership, all of the partners would be necessary parties to an action of debt for the price of the goods. It is not necessary to consider whether they would be in a suit for the value of the goods, if the possession thereof was obtained by the fraudulent representations of the defendant, because the court arrived at no conclusion that the goods were fraudulently obtained. But if Connally & Co. was a trust estate managed by the defendant as trustee, it is clear that the beneficiaries of the trust would not be necessary parties to a suit for a debt incurred in the management of the trust, if the trustee should be personally liable therefor; and this question

will be considered under another assignment raising that question.

Mere participation in profits does not constitute partnership, although there should be a contract from which they were derived: *Buzard v. Greenville Bank*, 67 Tex. 89; 60 Am. Rep. 70. There was no contract of partnership in this case. The defendant Nathan Connally acted as trustee under an appointment from the court, and had the entire control and sole management of the business. There was no right of control whatever reserved in the instrument executed by M. A. T. Connally to her father, C. P. Connally, as trustee, either for herself, or for the beneficiaries as such. A test of partnership is the right of control over the property or profits, or to make disposition thereof: 1 Bates on Partnership, sec. 37. There was no right whatever in the brothers of the grantor, who were beneficiaries therein, either to control or withdraw their several interests. From the terms of the instrument the business was to be conducted until the youngest was twenty-five years of age, or if he died before that time, to such a time as he would have been twenty-five if he had lived. We must also infer that at least some of the beneficiaries were minors, and it will not be contended that they could be partners, although the instrument might indicate a partnership. The finding of the court is further strengthened by the fact that there is no statement of facts brought up with the record, and there may have been proof of other facts to sustain his conclusion that Nathan Connally was the trustee of a trust estate. We think, however, that a proper construction of the instrument alone would lead to the same conclusion. There was no evidence to make the beneficiaries partners by holding out, but such a partner would not be a necessary party.

Appellant's ninth and tenth assignments of error are as follows:—

“The court erred in its conclusions of fact and law in finding that the estate of Connally & Co. was a trust estate, and Nathan Connally was trustee of same, and finding further that goods, wares, and merchandise mentioned in plaintiff's petition were sold and delivered to Connally & Co. by plaintiffs, and then rendering judgment against defendant Nathan Connally for the debt here sued on.

“The court erred in its finding of law that defendant Nathan Connally would be liable for said debt personally, because



he failed to make a contract with plaintiff exempting him from said liabilities."

As we are of the opinion that a trust estate was created by the instrument of conveyance from M. A. T. Connally to her father, C. P. Connally, it remains only to consider, under the above assignments, whether or not the trustee (the defendant) was personally liable for the goods purchased by him for the trust estate from plaintiffs.

Trustees of a corporate body with defined powers are not personally liable, and such has been the recognized rule in this state from the early decisions: *Traynham v. Jackson*, 15 Tex. 170; 65 Am. Dec. 152; *Dyer v. Sullivan*, 18 Tex. 771; *Gonzales College v. McHugh*, 89 Tex. 848; *Snyder v. Wiley*, 59 Tex. 449. But whether or not the trustee of a voluntary association or a trust estate is personally liable has not been before our supreme court in any case that we can find. That such trustees should be held personally liable is reasonable, because they have in their own hands the means wherewith to reimburse themselves, and should not assume a debt for the benefit of an estate of which they have the sole management and control without prospect of funds for payment thereof. If this principle needed to be enforced by way of illustration, it may be done by the fact that the defendant, a few days before the attachment, withdrew from the bank the deposit of Connally & Co. amounting to over four thousand dollars in cash. In *Hill on Trustees*, 533, the doctrine is broadly stated, that "a trustee who carries on any trade with the trust assets for the benefit of the *cestuis que trust* will be responsible to the creditors, not only to the extent of the trust assets, but also with the whole of his own property, and he may be made bankrupt and proceeded against in the same manner as any other trader. And it is immaterial that the trade is carried on by him in consequence of an express direction in the trust instrument; although the trust property will doubtless be primarily liable to the creditors, and will be first applied so far as it will go in discharge of the liabilities." Purchases by trustees, when made in obedience to the trust, impose upon them a personal liability; the seller must look to them for payment, and they must look to the trust estate for reimbursement: *Taylor v. Davis*, 110 U. S. 330; *Hewitt v. Phelps*, 105 U. S. 400; *Sanford v. Howard*, 29 Ala. 684; 68 Am. Dec. 101; *New v. Nicoll*, 73 N. Y. 127; 29 Am. Rep. 111. This doctrine is also recognized in *Mason v. Pomeroy*, 151 Mass. 164, and

*Odd Fellows Hall Ass'n v. McAllister*, 153 Mass. 292. The Alabama case was where a guardian was held liable. It is also reported in 68 Am. Dec. 101, which see for note as to executors and administrators. Our statute of frauds (Rev. Stats., art. 2484) has no application to the facts of this case, and does not affect the rule that would hold the trustee personally liable. Although the plaintiffs knew that the defendant was conducting the mercantile business of which he had the control and management as trustee for the benefit of the persons mentioned in the conveyance from M. A. T. Connally to her father C. P. Connally, and charged the goods when sold to Connally & Co., the defendant was nevertheless personally liable to the plaintiffs for the price of the goods, and it was not necessary first to establish the account as a debt against the trust estate. This rule is not only in accordance with the authorities, but is a salutary rule in the interest of common justice. Since the trustee was personally liable, it was not necessary that the beneficiaries should be made parties to the suit.

The account sued on was not barred by limitation when plaintiffs' first amended original petition was filed, so it is unnecessary to inquire whether or not the amended petition set up a new cause of action. It appears from the petition that the account was not due for a time after the date of the items, from which two years would extend past the filing of the amended petition; so the demurrer setting up limitation was properly overruled by the court.

We conclude that there was no error in the judgment of the court below, and that the same should be affirmed.

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**TRUSTS — PERSONAL LIABILITY OF TRUSTEE.** — A contract with a trustee, though for the benefit of the trust estate, imposes upon him a personal liability merely, in the absence of an express provision to the contrary; and a person so contracting with the trustee cannot proceed directly, in the first instance, against the trust estate: Note to *Johnson v. Leman*, 19 Am. St. Rep. 67, 68. Compare also *Findley v. Wilson*, 3 Litt. 390; 14 Am. Dec. 72; *McHildery v. McKensie*, 2 Port. 33; 27 Am. Dec. 643, and note; *Sanford v. Howard*, 29 Ala. 684; 68 Am. Dec. 101. and note.

In *Burke v. Concord Railroad*, 62 N. H. 531, it is decided that the rule, to the effect that a necessary expense of the legal management of a trust fund, whether incurred by the trustee or *cestui que trust*, may be charged upon the trust fund by a proceeding in equity, is applicable to the property of a business corporation.



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3. **EVIDENCE, COMMENT ON, SIMPLY STATING LEGAL EFFECT OF FACTS IS NOT.** — The simple statement by the court of the legal effect of facts in evidence is not a comment on the evidence. It is not, therefore, error for a court to instruct the jury that a deed left by the grantor in a place

where it is accessible to the grantee does not constitute a delivery, in the absence of an intention on the part of the grantor to deliver and of the grantee to accept. *Tyler v. Hall*, 337.

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### ATTORNEY AND CLIENT.

1. AUTHORITY OF ATTORNEY, PARTY ESTOPPED TO DENY, WHEN. — Where an attorney prepares a confession of judgment voluntarily made to a creditor, signing himself as attorney for plaintiff, advises the filing of the transcript of such judgment, and afterwards satisfies the judgment on the record, signing himself as attorney for the judgment creditor, as to an innocent purchaser for value, who parted with his money in the faith that such satisfaction was valid, the judgment creditor claiming the benefit of the judgment will be estopped from denying that the attorney had authority to act for him. While an attorney has no right, as between the parties, to enter satisfaction of a judgment without the actual receipt of the money due on it, yet where the rights of third persons intervene, a subsequent purchaser for value of the land affected by such judgment will be protected, even though it be afterwards made to appear that the satisfaction was improperly entered. *Wheeler v. Alderman*, 842.
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## BANKS AND BANKING.

1. **BANKS AND DEPOSITORS, RELATION BETWEEN — PAYMENT OF CHECKS.** — A bank, in receiving ordinary deposits, becomes the debtor of the depositor, and its implied contract with him is to discharge this indebtedness by honoring such checks as he may draw upon it, and it is not entitled to debit his account with any payments except such as are made by his order or direction. *Janin v. London etc. Bank*, 82.
2. **PAYMENT OF FORGED CHECKS** by a bank is made at its peril, and it is not justified in charging them against the depositor's account, unless some negligent act of his in some way contributed to induce such payment in the first instance, or unless, by his subsequent conduct in relation to the matter, he is equitably estopped to deny the correctness of such payment. *Janin v. London etc. Bank*, 82.
3. **PAYMENT OF FORGED CHECK — ESTOPPEL AGAINST DEPOSITOR.** — In an action by a depositor to recover the amount paid by a bank on a forged check, an estoppel against the depositor to deny his signature does not arise until there is some evidence of his negligence, or of other facts upon which it may be predicated. It cannot be based upon mere conjecture, even if a proper foundation is laid for it in other respects. *Janin v. London etc. Bank*, 82.
4. **PAYMENT OF FORGED CHECK. — NEGLIGENCE OF DEPOSITOR,** consisting in his delay in discovering and giving notice to the bank that a check paid by it is a forgery, will not prevent his recovery against the bank, when it cannot possibly have been prejudiced by such delay, or prevented from taking steps, by the arrest of the forger, or by an attachment of his property, or other form of proceeding, to compel restitution. *Janin v. London etc. Bank*, 82.
5. **PAYMENT OF FORGED CHECK — NEGLIGENCE OF DEPOSITOR — BURDEN OF PROOF.** — In an action by a depositor against a bank to recover the amount paid by it on a forged check, the burden of proof is upon the bank to show that it sustained damage or injury by the negligence of the depositor, and this it is required to show by evidence having some reasonable tendency to establish such fact. *Janin v. London etc. Bank*, 82.
6. **ACCOUNT STATED AFTER PAYMENT OF FORGED CHECK — NEGLIGENCE OF DEPOSITOR — EVIDENCE.** — Where a bank balances a depositor's pass-book containing a debit against him for a payment made on a forged check, and returns the book to him at the same time, this constitutes a statement of his account, making it his duty to examine it within a reasonable time, and to return it to the bank, without unreasonable delay, with notice of his objections to it; and unless such objection is made within a reasonable time, it becomes an account stated, casting the burden of proof on the depositor to show that the check with which he is debited is a forgery, and if it is reasonably probable that the bank has been prejudiced by his unreasonable acquiescence in the account as thus stated, he will not be permitted to open it by proof of its incorrectness. *Janin v. London etc. Bank*, 82.

7. **PAYMENT OF FORGED CHECK — NEGLIGENCE OF DEPOSITOR.** — In the absence of prior negligence by a depositor, inducing the payment of a forged check by a bank, it is not entitled to debit the amount thereof against his account, unless by reason of his subsequent negligence the bank has omitted to take proceedings which it otherwise could or would have taken to indemnify itself from loss. *Janin v. London etc. Bank*, 82.

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### BENEFICIAL ASSOCIATIONS.

1. **LIFE INSURANCE — BENEFIT SOCIETY — INITIATION NECESSARY TO MEMBERSHIP AND BENEFIT PRIVILEGES.** — Where it appears from the constitution and by-laws of a secret order or benefit society which insures the life of its members that initiation is indispensable to membership, and that it is only upon the death of a member that his beneficiary is entitled to receive his insurance, the facts that a person's application for membership has been accepted, and his "proposition fee" paid, will not entitle his beneficiary to any insurance in the event of his death before he has been initiated as a member of the society. *Mattin v. Supreme Lodge*, 886.
2. **REDUCTION OF BENEFITS.** — Where a member of a benefit association is entitled to and has been paid weekly benefits at a rate fixed by its charter, it cannot, by subsequent amendment to its by-laws, reduce the amount of benefits to which he is entitled under such charter. *Becker v. Berlin Ben. Society*, 624.
3. **CHANGE OF BENEFICIARY.** — The fact that one to whom a certificate of membership issued, in which his daughter was named as a beneficiary, subsequently married, and after his marriage inserted in the certificate the name of his wife as one of the beneficiaries, both he and his wife intending and believing that his doing so entitled her to be ranked as a beneficiary, does not have the effect of giving his wife any interest in the certificate, when it was issued subject to the by-laws of the order, which required any change of beneficiaries to be entered in the relief-fund certificate, or that such certificate be surrendered and a new certificate issued, payable to such person as the member might direct. This is not a case where equity can interfere to remedy a defective execution of a power. *Thomas v. Thomas*, 582.

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### BENEFIT SOCIETIES.

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## BILLS OF LADING.

1. **ASSIGNMENT — STOPPAGE IN TRANSITU.** — A bill of lading is a quasi negotiable instrument symbolizing the property described therein, and the delivery of the bill, with an assignment indorsed thereon, transfers to an assignee in good faith and for value a perfect title to the goods, thus defeating the seller's right of stoppage *in transitu*, though the goods are actually in transit at the time of the assignment. *Missouri Pac. R'y Co. v. Heidenheimer*, 861.
2. **ASSIGNMENT AS PLEDGE — STOPPAGE IN TRANSITU.** — The transfer of a bill of lading, by way of pledge or as collateral security for a loan, though it may not absolutely defeat the seller's right of stoppage *in transitu*, prevents him from asserting that right as against the transferee, until he has discharged the debt secured by the transfer. *Missouri Pac. R'y Co. v. Heidenheimer*, 861.
3. **ORIGINAL AND DUPLICATE — ASSIGNMENT — STOPPAGE IN TRANSITU.** — Two bills of lading, one marked "original" and the other "duplicate," issued by a railway company for the same goods, are of equal value, and the transfer by indorsement of the one marked "duplicate" by the consignee, who holds the legal title, to a *bona fide* assignee for value as collateral security, transfers the title to the goods, and defeats the seller's right of stoppage *in transitu*. *Missouri Pac. R'y Co. v. Heidenheimer*, 861.

## BOARDER.

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## BONDS.

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## BOUNDARIES.

1. **WHEN LIMITED TO MARGIN OF THE RIVER.** — Conveyance in which lands are described as running to low-water mark on the westerly side of F. River, and thence northerly along low-water mark on the west side of F. River, as established by a certain dam, to a town line, etc., does not include the land between low-water mark and the thread of the stream. Nor is this construction of the deed rendered inapplicable by the further fact that the grantor, being the owner of a dam, reserved the right of the flowage. *Allen v. Weber*, 51.
2. **BOUNDARY BY PAROL AGREEMENT — FACTS COMPETENT TO ESTABLISH.** — Where the question before the jury as to the location of a boundary line resting in parol agreement between the parties depends upon reference to calls in deeds admitted in evidence, the jury are properly permitted to look to the deeds and surrounding circumstances to ascertain the boundaries of the land conveyed. *Lecomte v. Toudoux*, 870.
3. **BOUNDARY BY PAROL AGREEMENT — ESTABLISHING.** — It is not necessary to the validity of a boundary between adjoining owners, resting in parol

agreement, that it should be supported by acquiescence, or acts from which an estoppel may spring. If the agreement is made under circumstances free from facts that would authorize a court of equity to set it aside, it must stand, although the parties may have been mistaken in their belief that the line agreed upon approximates to the true line as it is afterwards found to exist. *Lecomte v. Toudouze*, 870.

4. **BOUNDARY BY PAROL AGREEMENT — STATUTE OF FRAUDS.** — An oral agreement between adjoining owners establishing a boundary line between their lands is not prohibited by the statute of frauds, nor within the meaning of statutes regulating the manner of conveying real estate. *Lecomte v. Toudouze*, 870.
5. **BOUNDARY BY PAROL AGREEMENT — BINDING ERROR ON MARRIED WOMAN.** — A married woman who is a party to a parol agreement establishing a boundary line between adjoining owners is estopped to deny its existence as affecting her separate property. *Lecomte v. Toudouze*, 870.
6. **BOUNDARY BY PAROL AGREEMENT — HARMLESS ERROR.** — Where the jury, upon sufficient evidence, find the location of a boundary line resting in parol agreement between the parties, harmless and abstract errors in admitting or rejecting evidence, or in the charge as to the locality of the boundary line between them, are not grounds for reversal. *Lecomte v. Toudouze*, 870.

See **HOMESTEAD**, 5; **INJUNCTIONS**, 1; **IRRIGATION DISTRICTS**, 7.

### BROKERS.

- A CUSTOM OF BROKERS**, when collateral securities are put up as a margin, and an account becomes sufficiently reduced to jeopardize it, to advertise and sell the collaterals before proceeding against their customer for the amount due from him, is of no effect when the stocks of the customer have been sold at his request, and the broker is not carrying anything for him upon a margin. Hence a broker may then maintain an action for the balance due him, without first realizing on the collaterals in his hand. *De Cordova v. Barnum*, 538.

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### BURGLARY.

1. **EVIDENCE SUFFICIENT TO JUSTIFY JURY IN INFERRING BREAKING IN PROSECUTION FOR.** — Where, upon the trial for the burglary and larceny of a saddle from a stable, the evidence shows that the saddle was hung in its usual place on Sunday, and was not missed until the succeeding Wednesday, that the doors of the stable were intentionally kept fastened for the purpose of keeping in the stable some mares and colts that would have escaped therefrom if the door had been left open, and that it was not known that the doors were left open, such evidence is sufficient to warrant the jury in inferring the fact of breaking the stable by the thief. *State v. Warford*, 822.
2. **PRESUMPTION OF GUILT FROM RECENT POSSESSION OF STOLEN PROPERTY.** — The presumption of guilt arising from the recent possession of stolen

property is applied in cases of burglary and larceny as well as to cases of larceny. But such possession must, in order to raise the presumption of guilt, be an exclusive possession; and where, on the trial of two persons for burglary and larceny, the evidence shows that the joint possession of the stolen property did not commence until five or six weeks after the larceny, such joint possession is too remote to create a presumption that either of the defendants is guilty of the burglary. *State v. Warford*, 322.

#### BY-LAWS.

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#### CERTIFICATES.

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#### CLOUD ON TITLE.

**ACTION TO QUIET TITLE** IS A PROPER PROCEEDING AGAINST A MUNICIPAL CORPORATION to determine its claim that it holds the legal title to land in trust for the people of the state, and that the same has been dedicated to the use of the public. *People v. Holladay*, 136.

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A state statute which authorizes the placing of insane persons in certain hospitals or asylums within the state by their parents, guardians, relatives, or friends, or, if paupers, by the overseers of the poor, upon certificates of their insanity, made by two practicing physicians of good standing, and which provides that when placed in such hospitals or asylums they may be lawfully received and detained therein until discharged in one of the modes provided in the statute, where such statute provides no mode whereof the person confined can avail himself, as of



right, in his own behalf, is void, being in conflict with the provision of the fourteenth amendment of the constitution of the United States that no state shall deprive any person of life, liberty, or property without due process of law. "Due process of law" means at least some legal procedure in which the person proceeded against, if he is to be concluded thereby, shall have an opportunity to defend himself, and such statute does not provide for such a procedure. And a person held under the provisions of such statute is entitled to a discharge upon *habeas corpus*. *Doyle, Petitioner*, 759.

2. **DUE PROCESS OF LAW.** — A land-owner is not deprived of his property without due process of law, when he is allowed a hearing at any time before the lien of an assessment thereon becomes final. *In re Madera Irr. Dist.*, 108.

**See** CORPORATIONS, 7; COURTS, 2; INTERSTATE COMMERCE; LEGISLATURE, 1-3, 7; MUNICIPAL CORPORATIONS, 10, 11; STATUTES, 7; TAXES, 1, 2; WITNESSES, 1.

### CONTEMPT.

1. **SELF-CRIMINATION — HABEAS CORPUS.** — A party cited for contempt in compelling and inducing witnesses to absent themselves from the court and to disobey a subpoena is thereby charged with a statutory crime, in addition to a contempt of court, and cannot be compelled as a witness to prove the contempt, and thus criminate himself as to the other crime. If committed for contempt in refusing to thus testify, he is entitled to his discharge on *habeas corpus*. *In re Nickell*, 315.
2. **JURISDICTION — ORDER TO SHOW CAUSE IN PERSON — HABEAS CORPUS.** — Where a party is merely summoned under an order of court to appear in person and show cause why he should not be punished for contempt in failing and refusing to obey a prior order of court, he has the right to appear by attorney. That part of the order commanding him to appear in person is beyond the jurisdiction of the court. If he does so appear by attorney and offers to show cause, an order for his arrest for contempt in not appearing personally is without jurisdiction, and he is entitled to his discharge on *habeas corpus*. *Ex parte Gordan*, 154.
3. **PRACTICE. — RULE TO SHOW CAUSE** why a party should not be punished for a constructive contempt of court must be based upon a verified complaint or information. *In re Nickell*, 315.

### CONTRACTS.

1. **CONTRACT BETWEEN FATHER AND SON NOT CHANGED BY SUBSEQUENT CONTRACT BETWEEN CHILDREN.** — A contract between father and son, by which the latter undertakes to attend to and care for the former during his life, on consideration that the father is to will his home place to such son, is not changed, after part performance by the son, by an agreement entered into by the father's children, after his insanity has rendered him incapable of performing his part of the original contract. *Hudson v. Hudson*, 270.
2. **STATUTE OF FRAUDS — PROMISE TO ANSWER FOR THE DEBT OF ANOTHER.** — An agreement by a receiver of a corporation, that if a person having a lien on the property in his hands will permit him to sell it and to use the proceeds in the business of the receivership, he will pay for such property, is a promise to answer for the debt of another, because the

- original debt secured by the lien remains unsatisfied, and the promise of the receiver is collateral thereto. *Bray v. Parcher*, 17.
2. **STATUTE OF FRAUDS — CONSIDERATION.** — A PROMISE TO ANSWER FOR THE DEBT OF ANOTHER is void, unless made upon some new consideration of benefit accruing or moving directly to the promisor. Therefore, a promise by a receiver of a corporation, in consideration that the lienholder will permit property subject to the lien to be sold and the proceeds to be used in the business of the receivership, to pay such lienholder the amount of his lien, is not enforceable, because no benefit or advantage accrues to the receiver. *Bray v. Parcher*, 17.
  4. **CONTRACT IS NOT UPON A CONSIDERATION SUFFICIENT TO SUPPORT IT** when such consideration is an agreement to do acts the doing of which cannot be specifically enforced. *Grimmer v. Carlton*, 171.
  5. **CONTRACT THE CONSIDERATION OF WHICH IS A COMPROMISE OF A FELONY** is based upon illegal consideration, and therefore void. *Morrill v. Nightingale*, 207.
  6. **CONTRACT UPON ILLEGAL CONSIDERATION — DUTY OF THE COURT.** — If the objection that a contract was made upon illegal consideration is not interposed by the party sought to be charged, it is the duty of the court to make it on its own behalf. *Morrill v. Nightingale*, 207.
  7. **PUBLIC POLICY — LOCATION OF PUBLIC OFFICE — POST-OFFICE.** — Any contract made for the purpose of securing the location of a public office, such as a post-office, in any certain part of a city or elsewhere, or which prevents, or tends to prevent, the change or removal of such office, when the necessities of business or the interest of the public demand such change or removal, is opposed to public policy and void, as tending to the injury of the public service, and as subordinating the public welfare to individual convenience or gain. *Woodman v. Innes*, 274.
  8. **CONTRACT SPECIFYING THAT ALL CONTRACTS MUST BE IN WRITING.** — Notwithstanding a clause printed after a vendee's signature to a written contract of sale, stating that "no verbal agreement of any kind appertaining to this order will be recognized, and that all agreements must be in writing," the agent of a vendor, having power to make the original sale, and power to make a new contract in writing, is authorized to enter by parol into a new agreement extending or modifying the terms of the original agreement. *Bannon v. Aultman*, 37.
  9. **ALTERING WRITTEN, BY PAROL.** — Parol evidence is admissible to prove that a written contract has been added to, changed, or superseded by an oral agreement. Therefore, though a thrashing machine was sold by a contract in writing, providing that if within five days from its first use it should fail to fulfill the guaranty given with it, notice should be given to the vendor or his agent, stating the respects in which it had failed, and that the defective parts should be returned to the place where received, the vendee may prove that after he had received the machine and become satisfied it would not fulfill the warranty, he notified the agent of the vendor, and offered to return it, and the latter thereupon solicited him to keep the machine a longer time than the contract allowed, and agreed that if all defects were not remedied it might be returned to the vendor. *Bannon v. Aultman*, 37.
  10. **CONTRACT IS PROCURED BY MENACE**, and is therefore subject to rescission, when it was induced by procuring a warrant for the arrest of one of the contracting parties on a charge of embezzlement, and such warrant was obtained, not for the purpose of prosecuting or convicting him, but

with a view of frightening and intimidating him into executing such contract. *Merrill v. Nightingale*, 207.

11. **CONTRACT IS PROCURED BY MENACE** when it is obtained by threats of imprisonment upon a charge of embezzlement. *Merrill v. Nightingale*, 207.

12. **MENACE OF GUILTY PERSON.** — In that kind of menace which consists of a threat of injury to the character of a person it is entirely immaterial whether he is guilty or innocent of the crime charged. *Merrill v. Nightingale*, 207.

See AGENCY, 1; ASSUMPT; BANKS AND BANKING, 1; CORPORATIONS, 7; COVENANTS, 1; DAMAGES, 3, 4; GIFTS, 2; HOMESTEAD, 1-3; MASTER AND SERVANT, 5; MUNICIPAL CORPORATIONS, 12; NEGLIGENCE, 2; PARTNERSHIP, 5; RAILROADS, 13; STATUTES, 7; VENDOR AND PURCHASER, 2-5.

### CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE, 6; RAILROADS, 7, 8.

### CONVERSION.

See LARCENY; PLEDGE, 2; RAILROADS, 15.

### CORPORATIONS.

1. **EVIDENCE.** — THE EXISTENCE OF A CORPORATION is established *prima facie* by evidence tending to show that it transacted business as such, and by the fact that all the witnesses speak of it as a corporation. *People v. Formosa*, 612.

2. **SUBSCRIPTIONS TO STOCK OF CORPORATION TO BE FORMED.** — An agreement whereby the signers, for the purpose of forming a corporation and providing it with funds, declared that they subscribed for stock to the amounts set opposite their names, to be due and payable upon the formation of the corporation and the issuance of the stock, is valid; and upon the formation of the corporation and its acceptance of the agreement, each of the subscribers becomes bound to pay for the number of shares subscribed for by him. *Marysville Electric Light etc. Co. v. Johnson*, 215.

3. **CORPORATION MAY SUSTAIN AN ACTION FOR SUBSCRIPTIONS** made to its stock before it was formed, though it is not named as a promisee in the agreement to subscribe. *Marysville Electric Light etc. Co. v. Johnson*, 215.

4. **CONTRACT BETWEEN SEVERAL PERSONS TO AND WITH EACH OTHER** to form a corporation and subscribe to its stock is inchoate and incomplete until the contemplated organization is effected. Thereupon the corporation may accept the proposition offered by the several subscribers, and maintain actions to enforce their payment. *Marysville Electric Light etc. Co. v. Johnson*, 215.

5. **SUBSCRIPTIONS TO STOCK, WHEN PAYABLE.** — Though the statute provides that no assessment must exceed ten per cent of the amount of the capital stock of a corporation, except that if the whole has not been paid up and the corporation is unable to meet its liabilities, the assessment may be for the full amount of the unpaid subscriptions upon the capital stock, an agreement of subscription, whereby the subscribers agree that the amounts subscribed by them shall be due and payable on the formation of the corporation and the issuance of the stock, gives rise, on such formation, to a cause of action in favor of the corporation for the whole amount, without the levy of any assessment, though not then needed to

satisfy the liabilities of the corporation. *Marysville Electric Light etc. Co. v. Johnson*, 215.

6. **PLEADINGS.** — In an action to recover the amount subscribed by the defendant to the stock of a corporation to be thereafter formed, it is not necessary to allege that he was named in the articles of incorporation as a subscriber. If he was not so named, that fact must be shown by his answer. *Marysville Electric Light etc. Co. v. Johnson*, 215.
  7. **JURISDICTION OF SUPERIOR AND JUSTICE'S COURTS TO ENFORCE ASSESSMENTS ON STOCK BY CORPORATION.** — The term "assessment," as used in the California constitution conferring jurisdiction upon the superior court in cases at law involving the legality of any tax, impost, assessment, toll, or municipal fine, refers to such assessments as are authorized in relation to revenue and taxation, and such as may be made by authority of a municipal or other public corporation to meet the cost of a public improvement; and does not include "assessments" or "calls" made by a private corporation upon its stockholders pursuant to contract, express or implied. The justices' courts have jurisdiction of questions involving the legality of such "assessments" or "calls," where the amount in dispute is less than three hundred dollars. *Arroyo Ditch etc. Co. v. Superior Court*, 91.
  8. **DIRECTORS OF INSOLVENT CORPORATION TRUSTEES FOR CREDITORS, AND DEBARRED FROM PREFERRED DEBTS DUE TO THEMSELVES.** — The directors of an insolvent corporation are trustees for the creditors of such corporation, and are therefore debarred in equity, by virtue of their positions, from preferring debts due to themselves from the corporation. And a mortgage given by a corporation, while insolvent, to its directors, to secure debts due from it to them, will not be allowed priority over a person having, at the time of the execution of such mortgage, a claim against the corporation for damages for its negligence, upon which suit had been commenced, and which afterwards ripened into a judgment. *Olney v. Conanicut Land Co.*, 767.
  9. **TAXATION — JURISDICTION.** — A CORPORATION CREATED BY THE LAWS OF ANOTHER STATE, but doing business in this state, is subject to the jurisdiction of the officer whose duty it is to determine and assess the amount of taxes which the corporations are bound to pay to the state, and is subject to taxation as well as a domestic corporation. *People v. Wemple*, 542.
  10. **CONSTITUTIONAL LAW.** — CORPORATIONS organized or doing business under the laws of this state for life insurance are absolutely under the direction and control of the legislature, and the legislature has the same power and authority to regulate the conduct of their agents as it has to regulate the corporations themselves. *People v. Formosa*, 612.
  11. **TAXATION — JURISDICTION — TAX ON FOREIGN CORPORATIONS.** — If a corporation created by the laws of a sister state employs the whole or any part of its capital here, and thus has the benefit and protection of the government and laws of the state to the extent of the capital so employed, there is no reason why it should not be subject, to the extent of such capital, to the same burdens and obligations as a domestic corporation. The tax is imposed for the privilege, which is extended to it by the statute, of doing business here as a corporation and in its corporate name. *People v. Wemple*, 542.
- See **CONTRACTS**, 2, 3; **DEVISES**, 3; **DURESS**, 2, 3; **INSURANCE**, 2; **INTERSTATE COMMERCE**; **JUSTICE OF THE PEACE**, 2; **TAXES**, 2.

## CO-TENANCY.

1. **DUTY OF CO-TENANTS.** — A TENANT IN COMMON IN POSSESSION of the common property is bound to do nothing with a view to prejudicing the interests of his co-tenants, and therefore cannot buy in an outstanding title to the prejudice of their rights. *Carpenter v. Carpenter*, 569.
2. **MORTGAGE SALE.** — A tenant in common of property which is subject to a mortgage, who procures it to be foreclosed, without any necessity and for the purpose of cutting off the interest of some of his co-tenants, and then purchasing at a foreclosure sale, will not be permitted to retain the benefit of his purchase, but will be decreed to hold it in trust for his co-tenants, to the extent of their respective interests. *Carpenter v. Carpenter*, 569.
3. **PURCHASE BY CO-TENANT AT PARTITION SALE.** — Tenant in common bringing an action for partition and buying property at the partition sale will not be decreed to hold it in trust for his co-tenants. In instituting and prosecuting to judgment and sale a suit for partition, he does not violate any legal duty he owes to his co-tenants, though some of them are minors. *Carpenter v. Carpenter*, 569.

## COUNTIES.

See IRRIGATION DISTRICTS, 7.

## COURTS.

1. **JUDGE BOUND BY DECREE OF HIS PREDECESSOR IN SAME CAUSE.** — A circuit judge is bound to carry out the orders of his predecessor in the same cause, but when the appellate court declares such orders erroneous, the consequences flowing therefrom must also be so regarded. *Hardin v. Hardin*, 786.
  2. **ORIGINAL JURISDICTION OF SUPERIOR COURT.** — The superior court can exercise its original jurisdiction only in those cases provided by the constitution, and its appellate jurisdiction only in such cases as may be prescribed by law. It cannot exercise original jurisdiction in those matters in which its jurisdiction is appellate only, nor can it exercise jurisdiction in any instance until it has acquired it in the mode prescribed by the constitution or statutes. *Arroyo Ditch etc. Co. v. Superior Court*, 91.
  3. **JURISDICTION OF SUPERIOR COURT — PRESUMPTION.** — Although the exercise of jurisdiction by the superior court will be presumed to have been rightful, yet if it appears upon its record of its action in any matter that it had not acquired jurisdiction either of the subject-matter or of the parties, this presumption is destroyed. *Arroyo Ditch etc. Co. v. Superior Court*, 91.
  4. **JURISDICTION OF PROBATE COURT — PRESUMPTION.** — A county court has general jurisdiction of the administration of estates, and when nothing to the contrary appears upon its records, it will be presumed, upon collateral attacks on its judgments, that it found the facts to exist that would give it jurisdiction. *Lynne v. Sanford*, 852.
- See CONTEMPT; CONTRACTS, 6; IRRIGATION DISTRICTS, 3; JURISDICTION; LEGISLATURE, 4-6; PARTNERSHIP, 9; STATUTES, 6; TRIAL, 1; TRUSTS, 10, 14.

## COVENANTS.

1. **CONTRACT IN RESTRAINT OF EXERCISE OF PROFESSION VALID THOUGH UNLIMITED AS TO TIME.** — A covenant by a practicing physician not to engage at any time thereafter in the practice of medicine or surgery in a certain city is valid, and a court of equity will grant an injunction to restrain the covenantor from thereafter practicing his profession in said city. *French v. Parker*, 733.
2. **DEEDS. — COVENANT AGAINST ENCUMBRANCES** in a deed covers those unknown as well as those known to the grantee at the time of his purchase. *Burr v. Lamaster*, 428.
3. **DEEDS — ENCUMBRANCE — PARTY-WALL AGREEMENT.** — A covenant by the owner of a lot to pay a portion of the cost of a party-wall erected thereon, in the event that it is used by him, is a covenant and encumbrance which runs with the land, and is binding upon his grantee. It therefore constitutes a breach of the covenants in his deed against encumbrances. *Burr v. Lamaster*, 428.

See DEBTOR AND CREDITOR, 2.

## CRIMINAL LAW.

1. **THE CRIME OF UNLAWFULLY AND WILLFULLY DESTROYING THE PROPERTY OF ANOTHER** does not exist when the act of destruction was in the defense of the possession of property of the destroyer. *People v. Kane*, 574.
  2. **THE DESTRUCTION OF THE PERSONAL PROPERTY OF ANOTHER** is not criminal when it consists of a boat which the owner persists in keeping and fastening on a lake on the land of the destroyer, if such destruction is necessary in defense of the land-owner's possession of his land. *People v. Kane*, 574.
- See BURGLARY; CONTEMPT, 1; HOMICIDE; INDIOTMENT; INSANE PERSONS; INSURANCE, 19; LARCENY; LIBEL, 6, 7; NEW TRIAL, 5; REAL PROPERTY, 2; SEDUCTION.

## COY-PRES.

See TRUST, 12.

## DAMAGES.

1. **DAMAGES FOR MENTAL ANGUISH — WRONGFUL SEQUESTRATION.** — Mental distress or suffering is not an element of the actual damages sustained from the wrongful suing out of a writ of sequestration and a seizure thereunder. In order to recover for mental anguish, the suing out of the sequestration must be both wrongful and malicious, so as to justify a recovery for exemplary damages. *Crawford v. Doggett*, 859.
2. **DAMAGES RECOVERABLE FOR A TORT** include all injuries resulting from the wrongful act, whether they could have been foreseen by the wrong-doer or not. Therefore, in an action to recover for injuries resulting to plaintiff from being kicked by defendant, though there was evidence to show that there was no intention of doing any harm, and that the injury suffered by plaintiff was aggravated by his having received a previous injury, it was held proper to refuse an instruction that only such damages could be recovered as defendant might reasonably be supposed to have contemplated as likely to have resulted from his kicking plaintiff. *Veabury v. Putney*, 47.
3. **DAMAGES FOR BREACH OF CONTRACT — PENALTY — EVIDENCE.** — In an action for breach of contract not to carry on a given business within a certain

territory, or to forfeit a certain sum, evidence of the injury actually sustained by the breach is inadmissible, if the damages as liquidated in the contract are reasonable. *Kelso v. Reid*, 716.

- LIQUIDATED.**—Where one violates his contract by which he sells his business and its good-will, and stipulates as part of the transaction not to carry on the same business within a given territory, or to forfeit a certain sum as liquidated damages, he is liable for the amount named in the contract unless it is excessive and unreasonable. *Kelso v. Reid*, 716.

**See ASSAULT; CORPORATIONS, 8; DEBTOR AND CREDITOR, 8; EMINENT DOMAIN; HIGHWAYS, 2, 8; INJUNCTIONS, 5; INSURANCE, 5; MALICIOUS PROSECUTION, 15; MUNICIPAL CORPORATIONS, 13; NEGLIGENCE, 1, 8; NUISANCE, 1-4; PARENT AND CHILD; PHYSICIANS AND SURGEONS, 1, 2, 5; RAILROADS, 1, 2, 5, 12, 13, 18; SERVICES; STATES, 1; TELEGRAPHS, 2, 3, 6-8; TRESPASS; TRIAL, 8; VENDOR AND PURCHASER, 5; WATERCOURSES, 2-9, 12, 13; WITNESSES, 2.**

### DEBTOR AND CREDITOR.

- SUBROGATION, CREDITOR ENTITLED TO, WHEN.**—A creditor who, in order to preserve his own security, is compelled to pay a prior encumbrance, held by another creditor, will be subrogated to the rights of such creditor, to the extent necessary for his own protection. *Reyburn v. Mitchell*, 350.
- SUBROGATION — PURCHASER AT DEFECTIVE MORTGAGEE'S SALE SUBROGATED TO RIGHTS OF MORTGAGEE, WHEN.**—A *bona fide* purchaser at a mortgagee's sale which proves to be defective, who has paid the amount of his bid which has been applied to the mortgage debt, is entitled to be subrogated to the rights of the mortgagee, and the mortgage will be regarded in equity as assigned to such purchaser, even though the mortgagee's deed to him does not contain language amounting to a legal assignment. Such purchaser is not to be regarded as a mere stranger to the estate. Nor does it make any difference in equity that the mortgage was discharged on the record after the purchaser's right to subrogation had already accrued to him. *Brewer v. Nash*, 749.
- SUBROGATION — WARRANTY — LIMITATIONS — INJUNCTION.**—A sold a lot of land, upon which there was a judgment lien, to B, taking notes secured by a mortgage for the purchase price. When the notes matured they and the mortgage were canceled and surrendered to B, who gave to A a written unsealed agreement, whereby he assumed the payment of this judgment. Afterwards B conveyed said lot, with the usual covenants of warranty, to trustees for the benefit of his wife and children, in consideration of love and affection. These trustees conveyed the lot, as they were duly authorized to do, to C for value, without warranty, who took without knowledge of the agreement between A and B, but with notice of the judgment. C subsequently conveyed the lot to D with warranty. The lot having been levied upon, and being about to be sold under the judgment, C paid the amount of the judgment. Afterwards, in a cause pending for the settlement of the estate of B, who had in the mean time died insolvent, C filed a petition, wherein he sought to recover the amount paid by him in exoneration of his covenant of warranty to D. Held: 1. That as the payment of the judgment by C was not made for the purpose of relieving A, but solely in order to perform C's covenant of warranty, C had no right in equity to be subrogated to the rights of A or of the holder of the judgment; that as the judgment was against A, and not against B, who was never liable to pay the amount thereof as



a judgment, but only liable by reason of his agreement with B, the judgment could in no event be set up as a judgment against the estate of B. 2. That the mortgage could not be set up as a mortgage except against the property mortgaged, but only, if at all, as of the rank of the sealed notes which it secured; that since these notes were extinguished by the agreement between A and B, they could not now constitute any legal cause of action against B's estate, and C had no connection with any equities that A may have had in the matter. 3. That C could not claim as assignee of the covenant of warranty contained in the deed from A to B, nor could he have any claim against the estate of B as assignee of the covenant of warranty contained in the deed from B to the trustees, for as that was a voluntary deed, and as the measure of damages for breach of a covenant of warranty is the amount of the purchase-money paid, with interest from the time of the alienation, where nothing was paid, nothing could have been recovered. 4. That the agreement between A and B, whereby B assumed the payment of the judgment, was for the benefit of A solely, and C had no connection with it, and acquired no rights under it. 5. That the position of C was that of a purchaser of real estate under a quitclaim deed without warranty, upon which there rested the lien of a judgment of which he had notice when he purchased, who removed such lien by payment in order to protect himself against an action for breach of his covenant of warranty in his deed to his vendee, and that he had therefore no cause of action against the estate of B. 6. That even if C could have connected himself with the agreement between A and B, an action upon the promise of B was barred in six years, which period had elapsed long before the petition in this case was filed. 7. That the order calling in the creditors of B and enjoining suits at law did not prevent the running of the statute of limitations against claims that should have been presented as claims against his estate. *Ex parte Hardin*, 820.

4. **FRAUDULENT COMPOSITION WITH CREDITORS — SECRET PREFERENCES.** — A composition agreement between a debtor and his creditors is void if secret payments are made by the debtor or his agent to preferred creditors beyond their *pro rata* share under the agreement; and the rule is the same when such payments are made by friends or relatives of the debtor, with his knowledge, to induce a creditor to sign the agreement, although such payments were not made out of the debtor's assets. *Kullman v. Greenebaum*, 150.

5. **FRAUDULENT COMPOSITION WITH CREDITORS — VIOLATION OF AGREEMENT.** — A composition agreement is an agreement as well between the creditors as between the creditors and their debtor, by which each creditor agrees to receive the sum fixed by the agreement in full of his debt; and a secret agreement, by which a friend of the debtor undertakes to pay to one of the creditors more than his *pro rata* share, to induce him to unite in the composition, though the debtor is not a party thereto, and his assets are not diminished thereby, is as much of a fraud upon the other creditors as if such agreement was directly between the debtor and such creditor. Such an agreement violates the equity and mutual confidence between the creditors upon which the composition is based, and renders it void. *Kullman v. Greenebaum*, 150.

See **ASSIGNMENT**, 1; **ATTORNEY AND CLIENT**, 1; **CORPORATIONS**, 8; **DEEDS**, 6; **DURESS**, 2; **EQUITY**, 7; **EVIDENCE**, 9; **FRAUDULENT CONVEYANCES**; **HUSBAND AND WIFE**, 1; **MORTGAGES**, 2; **PARTNERSHIP**, 1, 3, 7, 8; **TRUSTS**, 16.

## DECLARATIONS.

See ESTOPPEL, 1; EVIDENCE, 4-8, 16; GIFTS, 4; TRUSTS, 2.

## DEDICATION.

**PUBLIC SQUARE.** — A map of the pueblo lands of the city of San Francisco, on which a tract of land was designated as a public square, operated as a dedication of such land to public use when the map was approved by an ordinance of such city, and the ordinance was ratified by an act of the legislature, and an act of Congress was passed granting to the city all right, title, and interest of the United States in such land. *People v. Holladay*, 186.

See CLOUD ON TITLE; JUDGMENTS, 9-12; MUNICIPAL CORPORATIONS, 8.

## DEED OF TRUST.

See MORTGAGES, 2.

## DEEDS.

1. **DEED BASED ON NON-ENFORCEABLE CONSIDERATION.** — Deed made in consideration that the grantor, an aged woman, in feeble health, should be supported and maintained for the balance of her natural life by her daughter, the grantee, is upon a consideration not enforceable, and therefore insufficient in law, and the deed will be canceled by a court of equity at the instance of the grantor. *Grimmer v. Carlton*, 171.
2. **EVIDENCE OF CONSIDERATION.** — A RECITAL IN A DEED that the consideration has been paid is not conclusive, nor does it estop the vendor from maintaining an action for the purchase price, on proof that the vendee agreed to pay an additional amount, contingent upon some future event or transaction, as that, upon resale by him, he would pay to the vendor a portion of the proceeds received in excess of the amount paid by him. *Byers v. Locke*, 212.
3. **REGISTRATION OF, FAILURE TO INDEX.** — Under a statute requiring each register of deeds to keep indexes in which the names of grantors must be entered in their alphabetical order, a tax deed is not regarded as recorded nor as admissible in evidence until it is indexed. *Hiles v. Atlee*, 32.
4. **CONVEYANCE.** — A RESERVATION IN A DEED IN FAVOR OF THE GRANTOR IS CONSTRUED MOST STRONGLY AGAINST HIM. *Grafton v. Moir*, 533.
5. **DELIVERY OF DEED, BURDEN OF PROOF OF, ON PARTY CLAIMING UNDER.** — Where, in an action of ejectment, the evidence is, that the deed under which the defendant claims title from his father, the original source of title, was found by the administrator of the father, in a desk kept by the deceased and under his control, among other papers belonging to him at his death, and was afterwards given into the defendant's possession by the administrator, the burden of proving that the deed was delivered before the father's death is on the defendant. *Tyler v. Hall*, 337.
6. **CONVEYANCE DELIVERED AFTER THE DEATH OF THE GRANTOR** cannot affect his creditors, nor constitute any obstacle whatever to the enforcement of their debts in the usual and ordinary course of administration. *Rosseau v. Bleau*, 578.
7. **DELIVERY OF DEED, WHAT NECESSARY TO CONSTITUTE VALID.** — To constitute a valid delivery of a deed, the dominion over the instrument must pass from the grantor with the intent that it shall pass to the grantee, if

the latter will accept it, and no particular form or ceremony is essential to constitute a delivery; it may be made by acts or words, or by both. But so long as the delivery of a deed remains incomplete, a grantor can change his intention relating thereto, and destroy the deed if he so desires. *Tyler v. Hall*, 337.

8. EVIDENCE TO SHOW PURPOSE OF. — Although the execution of a deed merges all prior conversations and statements of the parties, yet the purpose for which it was made may afterwards be shown by parol evidence. *Donisthorpe v. Fremont etc. R. R. Co.*, 387.
  9. RIGHT OF WAY — EVIDENCE TO SHOW PURPOSE OF. — Where a railroad company obtains a deed to a right of way, under representations that it is designed for the main line, and not for side-tracks, and it is afterwards used for side-track purposes, parol evidence is admissible to show the purpose for which the deed was executed. *Donisthorpe v. Fremont etc. R. R. Co.*, 387.
  10. BLANKS IN. — AUTHORITY BY PAROL may be given to fill material blanks in a mortgage or other sealed instrument; and when such authority is given, and the agent exceeds his instruction in filling the blanks, and negotiates the instrument to an innocent third person, the principal is bound by the acts of his agent, though unauthorized. Therefore, if a wife signs and delivers to her husband a mortgage with a blank as to description, relying upon his statement that it is to cover certain land belonging to him, and he inserts in the mortgage a description of their homestead, she is bound by this act of her husband. *Nelson v. McDonald*, 71.
  11. THE DELIVERY OF A CONVEYANCE TO AN ATTORNEY, with instructions to him to deliver it to the grantee, has the effect, when such delivery is made, to divest the title of the grantor, and vest it in the grantee by relation as of the date of the delivery to the attorney. *Recess v. Blum*, 578.
  12. AN ENCUMBRANCE IS ANY RIGHT TO OR INTEREST IN LAND which may subsist in third persons, to the diminution of the value of the land, and not inconsistent with the passing of the fee in it by deed. *Burr v. Lamaster*, 428.
- See APPEAL, 3; ATTORNEY AND CLIENT, 3; BOUNDARIES, 1, 2; COVENANTS, 2, 3; DEBTOR AND CREDITOR, 3; ESTOPPEL, 1; EVIDENCE, 2; EXROUTING, 2; HUSBAND AND WIFE, 1; RAILROADS, 1; VENDOR AND PURCHASER, 2.

#### DEFINITIONS.

- "Assessment." *Arroyo Ditch etc. Co. v. Superior Court*, 91.  
 "Bad Debt Collecting Agency." *State v. Armstrong*, 361.  
 "Bought for," "are the property of," and "belong to." *Estate of Smith*, 641.  
 "Burks" and "Banks." *Collins v. Ball*, 877.  
 "By inhaling gas." *Pickett v. Pac. Mut. etc. Ins. Co.*, 612.  
 "Calls." *Arroyo Ditch etc. Co. v. Superior Court*, 91.  
 "Canada" and "Kennedy." *State v. White*, 783.  
 "Cigar Makers' International Union." *McVey v. Brendel*, 633.  
 "Clearly proved." *Commonwealth v. Gerade*, 639.  
 Desertion. *Williams v. Williams*, 517.  
 "Due process of law." *Doyle, Petitioner*, 759.  
 "Duplicate." *Missouri Pac. R'y Co. v. Heidenheimer*, 331.  
 Encumbrance. *Burr v. Lamaster*, 428.  
 Executed trust. *Estate of Smith*, 641.

- Executory trust.** *Estate of Smith*, 641.
- "Futures."** *Gray v. Western U. Tel. Co.*, 252.
- "For promoting the mental, moral, and physical welfare of its members."**  
*McVey v. Brendel*, 625.
- "For Tom Smith Kelly."** *Estate of Smith*, 641.
- "Forris" and "Farria."** *Lyne v. Sanford*, 852.
- "Headache wafers."** *Gessler v. Grieb*, 20.
- Head of family.** *Roberts v. Moudy*, 426.
- Inn.** *Fay v. Pacific Imp. Co.*, 198.
- "In the usual course of trade."** *Wilson v. Denton*, 902.
- Libel.** *Street v. Johnson*, 42.
- "Lush is worse; come home."** *Western U. Tel. Co. v. Houghton*, 912.
- Mala fides.*** *Wilson v. Denton*, 8.
- "No verbal agreement of any kind appertaining to this order will be recognized, and that all agreements must be in writing."** *Bannon v. Aultman*, 87.
- "Original."** *Missouri Pac. R'y Co. v. Heidenheimer*, 881.
- "Proposition fee."** *Matkin v. Supreme Lodge*, 886.
- Res gestas.*** *Hermes v. Chicago etc. R'y Co.*, 60.
- Respondeat superior.*** *Bourn v. Hart*, 203.
- "Return to state."** *Burrows v. French*, 811.
- "Superhuman cause."** *Fay v. Pacific Imp. Co.*, 198.
- "The act of God."** *Fay v. Pacific Imp. Co.*, 198.
- "The necessary tools and instruments of any mechanic, miner, or other person, used and kept for the purpose of carrying on his business."** *White v. Gemeny*, 320.
- "Thereupon."** *Hill v. Wand*, 288.
- "Thereupon the defendants filed in writing their motion for a new trial."**  
*Hill v. Wand*, 288.
- "Tilden Trust."** *Tilden v. Green*, 487.
- Trade-marks.** *Gessler v. Grieb*, 20.
- "Trust" or "trustees."** *Estate of Smith*, 641.
- Undue influence.** *Carroll v. House*, 409.
- "Unless occasioned by an irresistible superhuman cause, by a public enemy, by the negligence of the owner, or by the act of some one he brought into the inn."** *Fay v. Pacific Imp. Co.*, 198.
- "Visitation of providence."** *Western etc. Pipe Lines v. Home Ins. Co.*, 708.
- "World's Fair."** *Daggett v. Colgan*, 95.
- "Your step-father died this morning."** *Western U. Tel. Co. v. Nations*, 914.

#### DELIVERY.

See **APPEAL**, 3; **DEEDS**, 5-7, 11; **NEGOTIABLE INSTRUMENTS**, 1.

#### DEMURRER.

See **JUDGMENTS**, 4.

#### DENTISTRY.

See **INSURANCE**, 17.

#### DEPOSITOR.

See **BANKS AND BANKING**.

## DESERTION.

See MARRIAGE AND DIVORCE, 2, 4.

## DEVISE.

1. DEVISE IN TRUST VOID BECAUSE NO BENEFICIARY IS DESIGNATED in the will cannot be made valid by the designation of a beneficiary by the trustees, in pursuance of a discretion vested in them by the will. *Tilden v. Green*, 487.
2. DEVISE IN TRUST IS VOID FOR WANT OF DESIGNATED BENEFICIARY when it devises property to trustees to be held for two lives in being, and requests the trustees to procure the passage of an act for an incorporation to be known as the "Tilden Trust," with capacity to establish and maintain a free library and reading-room in the city of New York, and to promote such scientific and educational objects as the trustees may more particularly designate, and authorizes them to convey such property to such corporation, when formed, but declares that in case it is not formed, or that, if from any cause or reason, they shall deem it inexpedient to convey to such corporation, then they are directed to apply it to the use of such charitable, educational, or scientific purposes as in their judgment will render such property most widely and substantially beneficial to the interests of mankind. This devise does not designate any beneficiary, but, on the contrary, leaves it to the discretion of the trustees whether or not they will convey or not to the corporation. Hence there is not, and cannot be, any person, natural or artificial, who is, or will become, entitled to the execution of the trust in his favor. *Tilden v. Green*, 487.
3. A DEVISE OR BEQUEST TO A CORPORATION TO BE CREATED after the death of the testator will be upheld, if the corporation is called into being within the time allowed for the vesting of future estates. The gift may be treated as in the nature of an executory devise, dependent upon the incorporation of the institution contemplated by the will, and as vesting upon the occurrence of that event. *Tilden v. Green*, 487.
4. WILLS — RESTRICTED DEVISE. — Where a testator gives an absolute estate, and in subsequent passages of the will unequivocally shows that he means the devisee to take a lesser interest only, the prior gift is restricted accordingly; but mere precatory words will not affect the prior estate. *Good v. Fichthorn*, 630.
5. WILLS — RESTRICTION ON DEVISE. — Where a testator gives his wife an absolute fee by will, with express power to consume or convey, without devising the unconsumed residue himself, but desiring his wife to do so in a certain manner, putting his request in strong words, ordinarily importing command, but so used as to indicate only an intent to control one of the incidents of the estate already devised, such request will not change, qualify, or reduce the estate previously given. *Good v. Fichthorn*, 630.
6. WILLS — PRECATORY RESTRICTION ON DEVISE. — Words in a will expressive of desire or recommendation will not convert an absolute devise into a trust, unless it clearly appears that the testator intended not to commit the entire estate to the devisee, or its ultimate disposal to his discretion; and while the words of request in the will are commands as to the direct disposition of the estate, yet they are not so as to limitations on previously granted estates, unless it affirmatively appears that they were intended to be imperative. *Good v. Fichthorn*, 630.

- 7. WILL — CONSTRUCTION OF DEVISE.** — A will stating, — 1. That the testator's homestead shall be reserved for those of his children who have no family, or, having a family, are destitute of a home and not able to work; 2. That all his other landed property is to be sold and the proceeds divided among his children; 3. That whatever other property he may be possessed of he gives to his wife, — does not give the wife the homestead, but it vests in his children. *Carpenter v. Carpenter*, 569.
- 8. WILLS — DEVISE UPON CONDITION THAT DEVISEE SHALL REFORM.** — A condition attached to a devise in a will, providing that the devisee named shall only take thereunder, if, at the expiration of ten years from the death of the testator, the devisee shall have become, in the judgment of the executors of the will, permanently and thoroughly reformed of intemperate habits, immoral consortings and associations, and should then be living with evident promise to continue to live virtuous and temperate for the remainder of his life, is valid and binding on the executors and on the devisee and will be upheld. *Hawke v. Euyart*, 391.
- 9. WILLS — DEVISE TO DESTROY MARRIAGE — PUBLIC POLICY.** — A condition attached to a devise by a father to his son, that the devisee shall be entitled to take under the will only when the executors thereof are satisfied that he has permanently freed himself of all influences, connections, associations, cohabitations, and relations, of every name, character, and description, with a certain woman named, to whom he was married at the time of the execution of the will, is void, as being against public policy, and in restraint of the marriage relation and its continuance, and the devise is operative to the same extent as though such condition had not been written in the will. *Hawke v. Euyart*, 391.

See ASSUMPSIT; FRAUDULENT CONVEYANCES, 1.

## DIRECTORS.

See CORPORATIONS, 8.

## DIVERSION.

See WATERCOURSES, 3-8, 10, 11.

## DOCTORS.

See PHYSICIANS AND SURGEONS.

## DUE PROCESS OF LAW.

See CONSTITUTIONS.

## DURESS.

1. DURESS OF PROPERTY cannot exist without there being a threat to do some act which the threatening party has no legal right to do, — some illegal exaction, or some fraud or deception. The restraint must be imminent, and such as to destroy free agency in a mind of ordinary firmness, without present means of protection. *York v. Hinkle*, 73.
2. A TRANSFER OF STOCK OF A CORPORATION CANNOT BE AVOIDED ON THE GROUND OF A THREAT that if such transfer was not made to a creditor of the corporation, he would take immediate steps to charge the property of the corporation with a large sum of money which it was owing to him, and that if the sale of the stock to any other person was attempted, such person would be informed of the existence of this cor-

porate debt, and of the intention of the creditor to enforce its payment, and the sale of the stock would thereby be prevented. *York v. Hinkle*, 72.

2. **DURESS OF PROPERTY — CORPORATIONS.** — ONE WHO PLACES HIS MONEY AND PROPERTY IN A CORPORATION, and thereby subjects it to the control of a majority of the stockholders, cannot avoid a transfer of his stock on the ground that it was induced by the threat of his co-stockholders to manage unwisely the corporate business. *York v. Hinkle*, 72.

### EASEMENTS.

**RIGHT OF PASSAGE NOT RESTRICTED TO SURFACE OF SOIL.** — When separate estates exist in the upper and lower portions of the same building, a right of passage may be created through the halls and passages above the surface as well as upon the surface itself. *Newhof v. Mayo*, 455.

See HIGHWAYS, 1, 2; LANDLORD AND TENANT, 1; PRIVATE WAY.

### EJECTMENT.

1. **PLEADING ESTOPPEL NOT NECESSARY IN EJECTMENT, WHEN.** — It is a general rule that an estoppel must be pleaded in order to be available as a defense, but this rule does not apply to ejectment suits in which the parties do not set up the title on which they rely. *Tyler v. Hall*, 337.
2. **EQUITABLE DEFENSE MAY BE SET UP BY ANSWER IN.** — A defendant in an action of ejectment may, under the Missouri code, interpose by answer an equitable defense, and his equities may be tried and determined directly in that action, without having to resort to an independent suit in equity. *Ogburn v. McLaughlin*, 369.

See APPEAL, 5; ESTOPPEL, 1.

### ELECTRIC-LIGHT COMPANIES.

See TAXES, 2.

### EMBEZZLEMENT.

See CONTRACTS, 19.

### EMINENT DOMAIN.

**SPECIAL DAMAGES WITHOUT ACTUAL TAKING.** — Where the property of a person has been specially depreciated in value, in excess of the injury sustained by the community at large, by reason of a public improvement, he is entitled to compensation in damages for such depreciation, although no part of his property is actually taken. *Omaha etc R. R. Co. v. Jarcock*, 399.

See NUISANCE, 5; RAILROADS, 2; TREMPASS.

### ENCUMBRANCES.

See COVENANTS, 2, 3; DEBTOR AND CREDITOR, 1; DEEDS, 12.

### EQUITY.

1. **COURT OF CHANCERY WILL DECIDE QUESTIONS OF LAW AS WELL AS OF EQUITY, WHEN.** — When the common-law and chancery jurisdictions are vested in the same tribunal, the court sitting in equity will decide questions of law as well as of equity, and will grant or refuse relief according as it decides them. *French v. Parker*, 733.



- 1. COURT OF EQUITY WILL NOT RETAIN CAUSE FOR COMPLETE DETERMINATION, WHEN.** — A court of equity which has rightfully acquired jurisdiction to grant an injunction for a special purpose will not, as a matter of right, retain the cause for the purpose of settling all the issues, where such issues are properly determinable in a court of law only. *Lador v. McGovern*, 446.
- 2. TRUST, ENFORCEMENT OF, IN EQUITY — STATUTE OF LIMITATIONS — DEMAND — LACHES.** — A court of equity has jurisdiction to enforce an express continuing trust created by a written instrument in these words: "I hereby certify that I hold in trust for Frances E. A. Gutch the sum of four thousand dollars, for which I agree to pay interest at five per cent per annum, and I promise to refund to her the said four thousand dollars on demand." And the fact that it may also be enforced at law will not oust the jurisdiction of equity. This certificate or declaration is not in effect a mere promissory note payable on demand, but a deposit in continuing trust until the *cestui que trust*, by her act in demanding payment, determines the trust. And where the bill to enforce this trust alleges that the actual demand for the restoration of the four thousand dollars was first made within six years before the commencement of the suit, since the suit would not have been barred by the statute of limitations if the money had been sued for at law, the statute will not be applied in equity. The complainant is not guilty of laches in not determining the trust during the lifetime of the trustee. *Gutch v. Foodick*, 473.
- 3. JUDGMENT BY DEFAULT OBTAINED BY FRAUD — EQUITABLE RELIEF.** — A judgment by default quieting title, obtained upon service of summons by publication, will be set aside in equity, when it appears that the complainant had no knowledge of the pendency of the former action or of the rendition of judgment therein until more than one year after its date, that he was the owner of the land in dispute, and that the defendant in equity knew that the allegations in his complaint in the former action were false, and that he secured an order for service of summons by publication by means of a false affidavit. *Dunlap v. Steere*, 143.
- 4. JUDGMENTS.** — EQUITABLE RELIEF IS GRANTED WHERE, BY ACCIDENT, MISTAKE, FRAUD, OR OTHERWISE, a party has obtained an unfair advantage in proceedings in a court of law, without negligence on the part of the adverse party, and which must necessarily make that court an instrument of injustice unless the advantage thus gained is restrained. *Dunlap v. Steere*, 143.
- 5. EQUITY WILL NOT RELIEVE AGAINST JUDGMENT NOT SHOWN TO BE UNJUST.** — A court of equity will not relieve a party from a judgment obtained against him for a debt which is neither alleged nor shown to be unjust. *Crocker v. Allen*, 831.
- 6. CREDITOR BOUND TO REDUCE HIS DEBT TO JUDGMENT BEFORE INVOKING.** — As a general rule, before a creditor can invoke the aid of a court of equity, he must reduce his debt to judgment, and exhaust his legal remedies, but where a number of the demands held by a plaintiff, who is the assignee of the creditors, have been reduced to judgment, the court thereby acquires jurisdiction of the subject-matter, and may proceed to do full and complete justice between the parties, and dispose of the whole matter before it. *Reyburn v. Mitchell*, 350.
- See** BENEFICIAL ASSOCIATIONS, 3; BOUNDARIES, 3; CORPORATIONS, 8; COVENANTS, 1; DEEDS, 1; EJECTMENT, 2; EXECUTORS AND ADMINISTRATORS, 14; FRAUDULENT CONVEYANCES, 1, 3; GIFTS, 1; INJUNCTIONS; INTERSTATE

COMMERCIAL; JUDGMENTS, 1, 6, 7, 14; LANDLORD AND TENANT, 3; MUNICIPAL CORPORATION, 12; PARTNERSHIP, 8; TRUSTS, 3, 4, 11.

### ERROR.

See APPEAL.

### ESTOPPEL.

1. **GRANTOR OF LAND ESTOPPED BY HIS DECLARATIONS AND DEED, WHEN.** — A person who conveys to another all the right, title, and interest that he inherited from his father in certain lands, declaring to his grantee, at the time of the conveyance, that a prior unrecorded deed of such lands from his father to him, containing restrictions on the alienation of his interest therein, had never been delivered to or accepted by him, will, in an action of ejectment brought against him by such grantee, be estopped by his declarations and deed from denying that his deed conveyed the estate in the land which he would have taken by inheritance, had no deed been made by his father to him. *Tyler v. Hall*, 337.
  2. **ESTOPPEL AGAINST OWNER.** — Where the owner of property holds out another as having power of disposition or authority over it for any purpose, he is estopped to deny the existence of such power, as against one who has innocently dealt with the party in whom such apparent power is vested. *Hill v. Wand*, 288.
- See ATTORNEY AND CLIENT, 1; BANKS AND BANKING, 2, 3; BOUNDARIES, 3; DEEDS, 2; EJECTMENT, 1; EXECUTION, 7; INSURANCE, 8, 9; JUDGMENTS, 4, 8, 13; LANDLORD AND TENANT, 2; MORTGAGES, 2, 3.

### EVIDENCE.

1. **PRESUMPTION THAT ORDINARY AND PROBABLE CONSEQUENCES OF ACT ARE INTENDED.** — Every sane man is presumed to intend the ordinary and probable consequences of any act that he purposely does. *State v. Leveille*, 799.
2. **INTERLINEATIONS IN PROBATE DEED.** — Interlineations in an administrator's deed offered in evidence are presumed to have been made before signing only when the deed and its surrounding circumstances are free from suspicion; and if such conditions do not exist, the deed is not admissible in evidence without satisfactory explanation. *Collins v. Ball*, 877.
3. **EVIDENCE OF LOST PROBATE INVENTORY.** — Where the original inventory is recorded, it becomes a record of the probate court, and when the original is lost, a certified copy is the best evidence with which to prove its contents, but parol evidence is not admissible for that purpose. *Collins v. Ball*, 877.
4. **RES GESTÆ MEAN** the circumstances, facts, and declarations which grow out of the main fact, contemporaneous with it, and serve to illustrate its character. *Hermes v. Chicago etc. R'y Co.*, 69.
5. **RES GESTÆ — DECLARATIONS.** — All declarations or exclamations uttered by the parties to a transaction which are contemporaneous with and accompany it, or which are made under such circumstances as will raise a reasonable presumption that they are the spontaneous utterance of thoughts created by or springing out of the transaction itself, and so soon thereafter as to exclude the presumption that they are the result of premeditation or design, and which are calculated to throw light on the

- motives and intention of the parties, are admissible in evidence as part of the *res gestæ*. *International etc. R'y Co. v. Anderson*, 902.
6. **RES GESTÆ — DECLARATIONS MADE SUBSEQUENT TO ACCIDENT.** — The declarations of one injured in a railway accident as to its cause, made at the place within a few minutes after it occurred, are admissible as part of the *res gestæ*. *Texas etc. R'y Co. v. Robertson*, 929.
7. **DECLARATIONS SUBSEQUENT TO ACCIDENT.** — Declarations of one injured in a railroad accident, as to its cause, made at the place, within a few minutes after it occurred, and while he was still writhing under the pain inflicted by it, are admissible as part of the *res gestæ*. *International etc. R'y Co. v. Anderson*, 902.
8. **RES GESTÆ — DECLARATIONS OF AN ENGINEER, MADE WITHIN A FEW MOMENTS** after a child was killed by being run over by a locomotive in his charge, are admissible as part of the *res gestæ*. *Hermes v. Chicago etc. R'y Co.*, 69.
9. **STATUTE OF FRAUDS. — PAROL EVIDENCE IS ADMISSIBLE TO PROVE THAT A CONVEYANCE** made by a judgment debtor, after the sale of his property under execution, was for the purpose of enabling the grantee to redeem it from such sale, and that the latter agreed to hold the premises, to make such advances as should be required to pay taxes and assessments, and upon the sale thereof to repay such advances with interest, and pay the residue of the proceeds of the sale to the judgment debtor. *Byers v. Locke*, 212.
10. **RECORD OF PROBATE SALE — EVIDENCE TO EXPLAIN.** — Where there are conflicting descriptions of the land sold in a probate record, or a latent ambiguity therein, the order of sale, or the whole or any part of the record, may be aided by reference to the inventory of the estate, or by extrinsic evidence, in order to indentify the land sold, but in the absence of such conflicting descriptions or latent ambiguity, other land than that which is clearly described in such record cannot be ingrafted therein by extrinsic evidence, for the purpose of showing that it was in fact the land intended to be conveyed. *Collins v. Ball*, 877.
11. **COMPARISON OF HANDWRITING TO SHOW MISTAKE IN DEED.** — Where the original inventory of an administrator is lost, letters written by the man who wrote it are not admissible to show an alleged mistake in the administrator's deed, for the reason that there can be no comparison of the handwriting. *Collins v. Ball*, 877.
12. **IDEM SONANS.** — The words "Burks" and "Banks" are neither *idem sonans* nor the same name. Parol evidence that land conveyed as being that of "Burks" was in fact that of "Banks" is inadmissible, in the absence of misdescription or latent ambiguity. *Collins v. Ball*, 877.
13. **EVIDENCE PASTED INTO INFORMATION, ADMISSIBILITY OF.** — The pasting of a portion of an envelope containing libelous matter into the information does not destroy its character as original evidence or affect its admissibility. *State v. Armstrong*, 361.
14. **TELEPHONE, CONVERSATIONS BY,** when pertinent, are admissible in evidence. *Missouri Pac. R'y Co. v. Heidenheimer*, 861.
15. **APPEAL — ADMISSION OF IMMATERIAL EVIDENCE — NON-PREJUDICIAL ERROR.** — Postal-card notice offering a reward, and giving a description of it and of the alleged thief, are not competent evidence to show that search was made for the accused, and that he fled from the state, but when the admission of such evidence is not prejudicial, it is not ground for reversal. *State v. Woodruff*, 285.
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16. **DECLARATIONS OF DECEASED OWNER** of land, made while in possession, and in disparagement of his title thereto, are admissible in evidence, not only against him and those claiming under him, but also for or against strangers. *McLeod v. Swain*, 229.
17. **RECORD IN ANOTHER SUIT**, to which defendant was neither a party and in which he was not interested, giving the names of certain persons as members of a firm, is inadmissible to show that plaintiff is not a member of that firm, as claimed by defendant. *Missouri Pac. Ry Co. v. Heidenheimer*, 861.
- See** APPEAL, 3; ATTORNEY AND CLIENT, 3; BOUNDARIES, 2, 6; BURGLARY; CORPORATIONS, 1; DAMAGES, 2, 3; DEEDS, 2, 3, 8, 9; GIFTS, 4; HIGHWAYS, 3; HOMICIDE, 3; INFANTS; INJUNCTIONS, 4; INSANE PERSONS, 2-4; INSURANCE, 18; IRRIGATION DISTRICTS, 4; LIBEL, 9; MALICIOUS PROSECUTION, 7, 10, 16, 17; NEGOTIABLE INSTRUMENTS, 2, 5, 8; NEW TRIAL, 1, 4, 5; NUISANCE, 5; PLEADING, 3; RAILROADS, 7, 8, 12, 17-21; SEDUCTION, 3; TRESPASS TO TRY TITLE; TRIAL, 1-3, 5, 7, 8; WATERCOURSES, 5, 6; WITNESSES.

### EXECUTION.

1. **EXEMPTIONS — HEAD OF FAMILY — DIVORCED HUSBAND.** — Where husband and wife are divorced, and the custody of their minor children is given to her, but he continues to furnish means for the support of such children, he is the head of a family, and entitled to the benefit of the exemption laws. *Roberts v. Moudy*, 426.
2. **EXEMPTIONS — RIGHT OF, WHEN SUPERIOR TO JUDGMENT.** — A party who, as the head of a family, is entitled to claim an exemption in land does not lose his right, as against the lien of a judgment for debt rendered against him, by subsequently conveying the land by deed of gift, when he has never parted with the possession. His possession is sufficient to maintain his exemption claim as against the lien of the judgment. *Pendleton v. Hooper*, 227.
3. **EXEMPTIONS.** — OMNIBUS OWNED BY HOTEL-KEEPER, and used by him in his business, is exempt from execution, under a statute exempting "the necessary tools and instruments of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade or business." *Watts v. Gemeny*, 320.
4. **EXEMPTIONS.** — LIBRARY AND IMPLEMENTS OF A PROFESSIONAL MAN are exempt from execution, whether he is the head of a family or not. *Roberts v. Moudy*, 426.
5. **EXEMPTIONS.** — MERE POSSESSION OF LAND by one entitled to an exemption right therein is sufficient to sustain the exemption as against debts, judgments, or other inferior liens. *Pendleton v. Hooper*, 227.
6. **EXECUTION ISSUED UNDER VOID JUDGMENT** is itself absolutely void, and may be attacked collaterally as well as directly, and its enforcement may be restrained by injunction. *Olson v. Nunnally*, 296.
7. **EXECUTION ISSUED UNDER VOID JUDGMENT — REDELIVERY BOND — ESTOPPEL — COLLATERAL ATTACK.** — Where a judgment upon which an execution is issued and levied is void, the party giving a redelivery bond, and thereby obtaining the right to retain possession of the property levied upon, does not thereby estop himself from afterwards asserting, either directly or collaterally, that the judgment and execution are absolutely void. *Olson v. Nunnally*, 296.

**See** EVIDENCE, 9; JUSTICE OF THE PEACE; LIENS, 1.

## EXECUTORS AND ADMINISTRATORS.

1. **LIMITATION ON GRANT OF ADMINISTRATION.** — When the law in force at the time of the death of an intestate does not fix the time within which administration of his estate must be commenced, the fact that administration was granted more than ten years after his death does not render it void. *Lyne v. Sanford*, 852.
2. **ESTATE OF DECEASED WIFE CHARGEABLE WITH EXPENSES OF ADMINISTRATION THEREON BY HUSBAND.** — A husband who administers upon the estate of his deceased wife is entitled to retain therefrom the funeral and probate expenses paid by him, together with a reasonable compensation for his services as administrator. *Moulton v. Smith*, 728.
3. **PHYSICIAN'S BILL FOR WIFE NOT CHARGEABLE AGAINST HER ESTATE.** — A bill for services rendered by a physician to a married woman in her last sickness is the personal debt of her husband, and where, after her death, he administers upon her estate, he is not entitled to charge it with the amount of such bill. *Moulton v. Smith*, 728.
4. **GRAVE-STONE PROPERLY REGARDED AS PART OF FUNERAL EXPENSES, WHEN.** — A grave-stone, if simple and inexpensive, may be properly regarded as part of the funeral expenses, when the estate of the deceased is solvent. *Moulton v. Smith*, 728.
5. **PROBATE SALES — IDEM SONANS.** — "Forris" and "Farris" are *idem sonans*, and a probate sale of land belonging to the estate of Willis A. Farris, but originally granted to Willis A. Forris, will convey a good title. *Lyne v. Sanford*, 852.
6. **ADMINISTRATOR'S SALE NOT JUDICIAL SALE.** — An administrator's sale is not a judicial sale under the Rhode Island statutes. *McGuinness v. Whalen*, 763.
7. **PROBATE SALES — LAND CERTIFICATE.** — Where a land certificate granted to a person by special statute is ordered sold by the probate court after his death in payment of his debts, the purchaser acquires a good title, especially if the certificate issues before the sale. *Lyne v. Sanford*, 852.
8. **PROBATE SALES — LAND CERTIFICATE.** — A land certificate granted by special statute to the heirs of a person named, in consideration of his right to receive it personally, is not a gift to the heirs of the person named, but it forms part of the assets of his estate after his death, and during administration thereon is subject to sale for the payment of his debts. *Lyne v. Sanford*, 852.
9. **PROBATE SALE — COLLATERAL ATTACK.** — Objections that the order for a probate sale was obtained, and the sale made without the necessary notice, cannot be urged when the sale is collaterally attacked. *Lyne v. Sanford*, 852.
10. **PROBATE SALES — COLLATERAL ATTACK.** — The absence of an exhibit under oath showing the condition of the estate, and what debts have been allowed at the time application is made by an administrator for an order to sell land, will not vitiate a sale made thereunder, upon collateral attack. *Lyne v. Sanford*, 852.
11. **PROBATE SALES — COLLATERAL ATTACK.** — Fraud in procuring an order for a probate sale, and in the sale thereunder, is available when the sale is directly attacked, but cannot be urged when it is collaterally assailed. *Lyne v. Sanford*, 852.
12. **PROBATE SALES — COLLATERAL ATTACK.** — Where an application by an administrator to sell land shows that the estate is indebted, and asks for an order to sell for the purpose of paying debts, the objection that the

application discloses no cause for administration and no reason for a sale is not available in a collateral attack upon a sale under such order. *Lynn v. Sanford*, 852.

13. **PROBATE SALES — COLLATERAL ATTACK — ALLOWANCE OF CLAIM.** — An order of sale granted on application of an administrator to sell land for the payment of a specified debt amounts to an allowance of such debt, and the sale cannot be collaterally attacked on the ground that it occurred before such claim was presented or allowed. *Lynn v. Sanford*, 852.
14. **LIEN ON WIFE'S ESTATE FOR EXPENSES OF ADMINISTRATION ENFORCED IN EQUITY, WHEN.** — Where a husband who, as administrator of the estate of his deceased wife, has the right to retain out of her estate the amount necessary to reimburse him for the funeral and probate expenses paid by him, and to compensate himself for his services as administrator, dies before settling his account with the probate court, his administrator may, by bill in equity against her administrator, establish a lien on her estate for such expenses and compensation; and such suit is not barred by the delay of the husband for more than two years after the death of his wife to render his account as administrator, nor by the omission of his administrator to have his intestate's account settled in the probate court before filing his bill in equity. *Moulton v. Smith*, 728.
- See ABATEMENT; ASSUMPT; DEEDS, 7; DEVISES, 8, 9; EVIDENCE, 2, 3, 10, 11; FRAUDULENT CONVEYANCES, 3; PARTNERSHIP, 5; TRUSTS, 12; WITNESSES, 2.

#### EXEMPTIONS.

See EXEMPTION, 1-5; HOMESTEAD, 5; PROBATE.

#### EXPERTS.

See WITNESSES, 5.

#### FELONY.

See CONTRACTS, 5.

#### FIGHTING.

See INSURANCE, 15.

#### FINDINGS.

See TRIAL, 6.

#### FIRES.

See INNKEEPERS, 3, 6; RAILROADS, 16-21.

#### FLOWAGE.

See BOUNDARIES, 1.

#### FORGERY.

See BANKS AND BANKING, 2-7; OFFICE AND OFFICERS, 1, 2.

#### FORNICATION.

See SLANDER, 1.

## FOURTEENTH AMENDMENT.

See CONSTITUTIONS, 1.

## FRAUD.

See ASSIGNMENT; DEBTOR AND CREDITOR, 4, 5; DURESS, 1; EQUITY, 4, 5; EXECUTORS AND ADMINISTRATORS, 11; JUDGMENTS, 5, 14; LARCENY; MORTGAGES; NEGOTIABLE INSTRUMENTS, 3; PARENT AND CHILD, 1; PARTNERSHIP, 1, 4; TRIAL, 2; USURY.

## FRAUDULENT CONVEYANCES.

1. **CONVEYANCE BY DEVISEE IN EXECUTION OF PROMISE TO TESTATOR UPHOLD AGAINST GRANTOR'S CREDITORS.** — Where a testator, after making a devise of land, wishing to compensate the devisee's wife for taking care of him in his last sickness, exacts from the devisee a promise to convey the land to the wife, after the testator's death, a conveyance made in execution of such promise will be upheld in equity against the creditors of the devisee. *Carver v. Todd*, 466.
2. **CHATTEL MORTGAGE TO SECURE FUTURE LEGAL SERVICES.** — A chattel mortgage executed by an insolvent debtor, transferring or conveying his property to an attorney, or to some one for the benefit of the attorney, for future legal services to be rendered in whatever litigation the debtor might thereafter be engaged, is fraudulent and void as to the debtor's creditors, and its execution is ground for the issuance of attachments against him. *Shellabarger v. Mottin*, 306.
3. **EQUITY WILL NOT AID THE SUIT OF AN ADMINISTRATOR** to set aside a conveyance purporting to be made by his intestate, but not delivered in his lifetime, because such conveyance interposes no obstacle to the assertion of the rights of the creditors of the decedent, nor is it any cloud upon any right or interest which such creditors have. *Rossau v. Blau*, 573.

## GAMING.

See WITNESSES, 1.

## GIFTS.

1. **WHAT CONSTITUTES.** — The owner of personal property, in order to make a voluntary disposition of it, may, by a proper transfer of the title, make a gift of it directly to the donee, or he may impress upon it a trust for the benefit of the donee; but whether a gift or a trust is intended, if the transaction still remains imperfect and executory, equity will not aid in its enforcement. *Estate of Smith*, 641.
2. **WHAT CONSTITUTES.** — Nothing can take effect as an assignment or gift which does not manifest an intention to relinquish the right of dominion on one hand and to create it on the other. If such intention exists, a want of consideration is immaterial; but if it does not exist, the transaction is not a gift, but merely a contract. *Estate of Smith*, 641.
3. **DEPOSITS IN TRUST MADE BY PARENT FOR HIS CHILDREN TREATED AS GIFTS, NOT ADVANCEMENTS, WHEN.** — Where a father makes a deposit in a savings bank in the name of each of three of his six children, himself as trustee, draws no part of the principal or interest of such deposits, retains the deposit-books until his death, tells each of his said children that the money shall be theirs at his death, and makes no charge nor memorandum nor delivery in the presence of witnesses, as required by



statute to evidence an advancement, such deposits are to be regarded as gifts, and not as advancements, and each of said children is, on the father's death, entitled to receive the deposit made in his name, and to hold it as his own without accounting for it to the estate. And where the father also makes a like deposit in a similar manner for another of his said children, and afterwards withdraws it with the interest thereon, and invests the same in his individual name, such child will be entitled to the money deposited for him, with the interest which has accrued thereon, both under the original and later form of deposit, for the trust in his favor having been once completely constituted, the trustee had no power to revoke it. *Atkinson, Petitioner*, 745.

4. **POSSESSION OF LAND, INTENTION OF PARTY IN PUTTING ANOTHER IN, INFERENCES AS TO.** — Whether a deceased father placed his son in possession of land for the sole purpose of permitting him to enjoy the rents and profits, or in pursuance of a previous gift thereof to him, is a question of intention, to be inferred from the relations of the parties, their conduct and declarations, and all the facts and circumstances in evidence in the case. *Tyler v. Hall*, 337.
  5. **THAT THE GIFT OF THE INCOME OF PROPERTY** is a gift of the property itself is true only when there is no limit of time attached to the gift. *Matter of Smith*, 586.
  6. **A GIFT OF INCOME, FOLLOWED BY THE GIFT OVER OF THE CORPUS ON THE HAPPENING OF A CONTINGENCY, or on the death of a beneficiary, by necessary construction, without express words, is a gift of the income for the intermediate period only.** *Matter of Smith*, 586.
- See **DEVISES**, 3, 4; **EXECUTION**, 2; **LEGACIES**, 3, 4; **STATUTES**, 7; **TRUSTS**, 2, 12, 13.

### GRANTS.

See **PRIVATE WAYS**, 1, 5.

### GUARANTY.

See **CONTRACTS**, 9; **OFFICE AND OFFICERS**, 2.

### HABEAS CORPUS.

See **CONSTITUTIONS**, 1; **CONTEMPT**, 1, 2.

### HEAD OF FAMILY.

See **EXECUTION**, 1, 2, 4.

### HIGHWAYS.

1. **MUNICIPAL CORPORATION — STREETS.** — A MERE ABUTTER, with no ownership in the bed of the street, is entitled to protection against interference with certain easements in the street. They constitute property of which he cannot be deprived without compensation. *City of Buffalo v. Pratt*, 592.
2. **MUNICIPAL CORPORATION — STREETS.** — ABUTTING LAND-OWNER WHO OWNS THE FEE OF A STREET in front of his premises, subject to an easement therein as a public highway, has a right to defend against and enjoin the use of the street for purposes inconsistent with those uses to which streets should be, or ordinarily have been, subjected, unless just compensation is made; and if the municipality is authorized to institute

proceedings to acquire the fee on such streets, it must pay substantial damages, to be ascertained by measuring the effect upon the value of the property resulting from depriving the owner of the fee of the streets. *City of Buffalo v. Pratt*, 592.

**1. MUNICIPAL CORPORATIONS — VACATION OF STREET — DAMAGES — PRESUMPTION.** — Where a city, possessing the power, vacates one of its streets, the abutting owners are entitled to damages for the injury sustained thereby; and if one of them sustains special injury in excess of that suffered by the community at large, he is entitled to damages therefor; but it will be presumed, in the absence of evidence to the contrary, that the damages tendered by the city are adequate for that purpose. *Lindsay v. Omaha*, 415.

**2. LIABILITY OF LAND-OWNER WHO ALTERS GRADE OF HIGHWAY.** — A land-owner, who, by permission of a turnpike company, alters the grade of a public highway on his land, assumes the duty and obligation of such company to make the altered road suitable and safe for public travel. *Horstick v. Dunkle*, 685.

**3. LIABILITY OF LAND-OWNER FOR INJURY CAUSED BY FRIGHTENED HORSE ON HIGHWAY.** — An adjoining land-owner who maintains an unfenced pond fifteen feet from the edge of a public highway and twenty-seven feet from the traveled part of the road, which is suitable for travel, is not liable to a traveler whose horse, becoming frightened from some unknown cause not attributable to the road or the pond, leaves the road and carries his owner into such pond, where he receives the injury complained of. *Horstick v. Dunkle*, 685.

**4. LIABILITY FOR INJURY CAUSED BY FRIGHTENED HORSE.** — Township officers or others whose duty it is to keep a public highway safe and suitable for travel are only bound to anticipate the ordinary needs of travel conducted in the ordinary manner, and they are not bound to anticipate the danger to which the frightened horse of a traveler may expose him. *Horstick v. Dunkle*, 685.

See INJUNCTIONS, 1; INNKEEPERS, 2; NEGLIGENCE, 5.

## HOMESTEAD.

**1. HOMESTEAD ON LAND HELD UNDER CONTRACT TO PURCHASE.** — One who holds the equitable title to land, under a contract for the purchase thereof, may impress it with a homestead lien the same as if he held the estate in fee, except that it is subject to the claim of the vendor for the unpaid purchase-money; and if such vendee afterwards acquires the estate in fee, under the terms of the contract, the homestead claim will attach thereto, and be superior to any claim to the land which accrued after the declaration of homestead was filed for record. *Alexander v. Jackson*, 158.

**2. HOMESTEAD UNDER CONTRACT OF PURCHASE — LIABILITY OF, FOR PURCHASE-MONEY — PURCHASER FROM HUSBAND TAKES SUBJECT TO — SUBROGATION — FORFEITURE OF CONTRACT.** — Where a wife files a declaration of homestead on community property held by her husband under a contract of purchase, he holds as her trustee to perfect the title, and a purchaser from him alone, with notice of the homestead claim, holds subject to the homestead. After such purchaser has received a conveyance from the original vendor, he is subrogated to his rights under the contract so as to be entitled to receive the amount of purchase-money paid by him before he can be compelled to convey to the wife of his vendor; but before he can put her in default for the non-payment of such purchase-money,

he must make a demand upon her therefor, and notify her of his relation to the property, and of his intention to claim a forfeiture under the original contract; and a mere demand by him for the possession of the premises will not put her in such default. *Alexander v. Jackson*, 158.

3. **HOMESTEAD UNDER EQUITABLE TITLE — PURCHASER FROM HUSBAND WITH NOTICE TAKES SUBJECT TO.** — Where a wife files a declaration of homestead upon land held as community property by her husband under a contract of purchase, he cannot, by any act in which she does not join, transfer such contract so as to defeat the homestead claim. The husband holds such contract in trust for the community, for the purpose of perfecting the title; and if he transfers it to a purchaser with notice of the homestead claim, the latter will take it subject thereto; and if he obtains a conveyance in fee from the original vendor, he holds the land subject to the claim of homestead by his vendor's wife. *Alexander v. Jackson*, 158.
4. **TO WHAT TITLE OR INTEREST WILL ATTACH.** — Whatever the character of the title or interest in the land held at the time of filing a declaration of homestead thereon, the homestead right will attach to such title or interest, and whatever may inure to or grow out of that title will be impressed with such right equally with the original title. *Alexander v. Jackson*, 158.
5. **TRACTS OF LAND WHICH CORNER.** — A homestead must consist of one body of land, and where the claimant owns two tracts within the homestead limit, but which touch only at a common corner, he cannot claim them both as exempt, and is entitled to a homestead only in the tract on which he resides. *Linn County Bank v. Hopkins*, 309.

See DEEDS, 10; DEVISES, 7.

### HOMICIDE.

1. **SUICIDE, ONE WHO KILLS ANOTHER IN ATTEMPTING TO COMMIT, GUILTY OF MURDER.** — Where suicide is treated as a felony, one who, in attempting to commit suicide, unintentionally kills another is guilty of murder. *State v. Levell*, 799.
2. **PROVOCATION BY WORDS ONLY NOT SUFFICIENT TO REDUCE CRIME FROM MURDER TO MANSLAUGHTER.** — Where a homicide is committed with a deadly weapon, provocation by words only, no matter how opprobrious, is not sufficient to reduce the crime from murder to manslaughter. *State v. Levell*, 799.
3. **MALICE INFERRED FROM USE OF DEADLY WEAPON.** — Malice may be inferred from the use of a deadly weapon, causing death, unless rebutted by other testimony. *State v. Levell*, 799.
4. **MALICE IMPLIED WITHOUT REFERENCE TO WHAT WAS PASSING IN PRISONER'S MIND, WHEN.** — If the act which produced death be attended with such circumstances as indicate a wicked, depraved, and malignant spirit, the law will imply malice, without reference to what was passing in the prisoner's mind at the time. *State v. Levell*, 799.

### HOTELS.

See INNKEEPERS, 2.

### HUSBAND AND WIFE.

1. **HUSBAND MAY SECURE DEBT DUE TO HIS WIFE BY CONVEYING HIS PROPERTY TO HER, WHEN.** — Where a husband, indebted to his wife for ad-

vances made by her to enable him to build upon lots owned by him, in fulfillment of a prior promise, makes to her a deed of the property just before a judgment is entered against him by another creditor, standing upon an equal footing with her, for a debt incurred by him before he acquired title to the lots, the wife receiving the deed without any design to defraud others by the form of the conveyance, such deed will not be avoided at the suit of such creditor, but will be sustained as a security for the amount for which the grantor was indebted to the grantee. *Brook v. Hudson County Nat. Bank*, 451.

2. **MARRIED WOMAN IS PERSONALLY LIABLE ON A NOTE** signed by her and her husband, and by her delivered to him with authority to negotiate it. *Nelson v. McDonald*, 71.

3. **LIABILITY OF WIFE FOR TORT.** — A wife is liable for wrongfully suing out a writ of sequestration jointly with her husband, unless she acts under his coercion. *Crawford v. Doggett*, 859.

See **BENEFICIAL ASSOCIATIONS**, 3; **DEEDS**, 10; **EXECUTIONS**, 1; **EXECUTORS AND ADMINISTRATORS**, 2, 3, 14; **HOMESTEAD**, 2, 3; **MARRIAGE AND DIVORCE**; **PARENT AND CHILD**, 2; **RAILROADS**, 14; **TRUSTS**, 13.

### IDEM SONANS.

See **EVIDENCE**, 12; **EXECUTORS AND ADMINISTRATORS**, 5; **INDICTMENT**, 2.

### IMPOSTS.

See **CORPORATIONS**, 7.

### INCOME.

See **GIFTS**, 5, 6.

### INDEPENDENT CONTRACTOR.

See **MASTER AND SERVANT**, 1-5; **RAILROADS**, 9-11.

### INDEX.

See **DEEDS**, 2.

### INDICTMENT.

1. **CRIMINAL LAW—VERIFICATION TO INFORMATION UPON KNOWLEDGE AND BELIEF SUFFICIENT.** — The verification to an information charging a criminal libel is sufficient where the facts are stated to be true to the affiant's best knowledge and belief. *State v. Armstrong*, 361.

2. **IDEM SONANS, "CANADA" AND "KENNEDY" ARE, WHEN.** — In describing persons other than the accused in an indictment for larceny, certainty to a common intent is all that is necessary. And where, in such an indictment, the name of the owner of the stolen goods is laid as Canada McCutchen instead of Kennedy McCutchen, and the defendant is not thereby misled in preparing his defense, the variance is not fatal, Canada and Kennedy being *idem sonans*. *State v. White*, 783.

See **SEDUCTION**; **SLANDER** 1; **TELEGRAPHY**, 1, 5.

### INFANTS.

1. **NEGLECT OF INFANT—CAPACITY AND DISCRETION.** — The measure of the responsibility of a child for negligence is his capacity to see and appreciate danger, and in the absence of clear evidence of a lack of it, he will be

held to such measure of discretion as is usual in those of his age and experience. Such measure makes no sudden leap at the age of fourteen, but varies with each additional year, and the increase of responsibility is gradual. *Kehler v. Schwank*, 633.

2. **NEGLIGENCE OF INFANT—PRESUMPTION.** — The age of fourteen years is simply the convenient point at which the law changes the presumption of capacity to avoid danger, and puts upon an infant the burden of showing his personal want of intelligence, prudence, foresight, or strength usual in those of that age, to excuse his negligence. *Kehler v. Schwank*, 633.

See CO-TENANCY, 3; TRIAL, 2.

### INFORMATION.

See CONTEMPT, 3; EVIDENCE, 13; INDICTMENT; LIBEL, 6, 7; PLEADING, 1.

### INITIATION.

See BENEFICIAL ASSOCIATIONS, 1; INSURANCE, 14.

### INJUNCTIONS.

1. **INJUNCTION AGAINST THREATENED TRESPASS, WHEN GRANTED.** — Although, in case of threatened trespasses, courts of equity generally leave the suffering party to his remedy at law, yet when such party is in possession, and the trespass, if permitted, will result in irreparable injury, or tend to the destruction of the estate, the courts will interpose by injunction. Where, therefore, a bill avers that at the time of its filing the defendants are purposing, not only to remove a building from a lot belonging to the complainants, thus destroying a portion of their estate, but also to grade the lot, thus obliterating its boundaries, and throwing it open to use as a part of the highway, so that the complainants, in order to reach a complete remedy, may not only have to prosecute the defendants for their damages, but also to establish their right as against the public, such bill states a case that falls within the class of cases in which threatened trespasses are enjoined. *Lewis v. North Kingstown*, 724.
2. **JUDGMENTS — SUIT TO ENJOIN.** — In an action to enjoin a judgment upon the ground that it was rendered through a breach of duty by an attorney, and that the plaintiff has a full and complete defense, the facts constituting such defense must be pleaded, and must be sufficient to show that the judgment is unjust. *Hartford etc. Ins. Co. v. Meyer*, 384.
3. **JUDGMENTS — INJUNCTION AGAINST.** — A judgment will not be enjoined unless it appears to be inequitable as between the parties, no matter how irregular were the proceedings under which it was rendered. *Hartford etc. Ins. Co. v. Meyer*, 384.
4. **JUDGMENT SATISFIED ON RECORD, SALE UNDER, ENJOINED WHEN.** — Where money is lent upon land, and a mortgage given to secure its payment, after a satisfaction of a prior judgment against the owner of the land is made upon the face of the record, and a party purchases for value at a sale of the land under the foreclosure of the mortgage, without notice that the entry of the satisfaction was made without authority, after which the judgment creditor, on notice to the judgment debtor only, has such entry of satisfaction vacated, issues execution, makes a levy, and advertises the land for sale thereunder, such purchaser may invoke the aid of a court of equity to enjoin the sale under the judgment, although

no collusion between the parties to the judgment is shown. *Wheeler v. Alderman*, 842.

**DOING, PENDENTE LITE, ACTS SOUGHT TO BE ENJOINED NOT GROUND FOR DISMISSING INJUNCTION BILL.** — A defendant in an injunction bill cannot oust the court of its jurisdiction by committing, *pendente lite*, the very acts to prevent which the suit was begun. And where a defendant in such a suit sets forth in his answer that he has, *pendente lite*, performed the acts sought to be enjoined, and avers that the complainant's remedy at law is complete, the court will not, on his motion, dismiss the bill, but will retain it for the purpose of affording relief to the complainant by determining the amount of compensation to be awarded to him, although the nature and measure of such compensation are precisely the same as he would otherwise recover as damages in an action at law. And if it be necessary for the complainant to amend his bill, he should be allowed to do so. *Lewis v. North Kingston*, 724.

**See COVENANTS, 1; DEBTOR AND CREDITOR, 3; EQUITY, 2; EXECUTION, 6; HIGHWAYS, 2; INTERSTATE COMMERCE, 1; IRRIGATION DISTRICTS, 13; JUDGMENT, 1; JUSTICE OF THE PEACE, 1; MUNICIPAL CORPORATIONS, 12; NUISANCE, 3; RAILROADS, 1; TRADE-MARKS, 4.**

### INNKEEPERS.

1. **AN INN** is a house which is held out to the public as a place where all transient persons who come will be received and entertained as guests for compensation. The fact that the house is open for the public, that those who patronize it come to it upon an invitation which is extended to the general public, and without any previous claim for accommodation or agreement as to the duration of their stay, marks the main distinction between an inn and a boarding-house. *Fay v. Pacific Imp. Co.*, 198.
2. **AN INN IS NOT THE LESS ONE** because in some respects it is conducted differently or has more attractions than other public hotels, so long as it is held out to the public as a place for the entertainment of transient persons who have occasion to patronize it. Hence a house having the other characteristics of an inn is not converted into a mere boarding-house by the fact that it is not situate upon a public highway, and that the grounds upon which it stands are inclosed, and the gates locked at night. *Fay v. Pacific Imp. Co.*, 198.
3. **INNKEEPERS ARE LIABLE** for a loss resulting from an accidental fire, unless it was started by lightning, or some superhuman agency. *Fay v. Pacific Imp. Co.*, 198.
4. **INNKEEPER IS LIABLE**, under the Civil Code of California, for the loss of personal property placed by guests under his care, "unless occasioned by an irresistible superhuman cause, by a public enemy, by the negligence of the owner, or by the act of some one he brought into the inn." The words "superhuman cause," as here used, are equivalent in meaning to the phrase "the act of God." *Fay v. Pacific Imp. Co.*, 198.
5. **GUESTS.** — A PERSON IS TO BE DEEMED A GUEST at an inn, and not a boarder, though upon his arrival he ascertains, before being assigned to a room, what he will have to pay for room and board, if his intention was to remain for a week or two only, and then to proceed to the East, and there was no agreement as to the time he would stay, nor any reduction in price in consideration of the agreement to remain a definite time. *Fay v. Pacific Imp. Co.*, 198.
6. **OWNERS AND GUESTS MAY RETAIN POSSESSION OF PROPERTY** intended

for their personal use, as jewelry and wearing apparel, without discharging the innkeeper from responsibility for its loss or destruction by fire while in the room of the guest. *Fay v. Pacific Imp. Co.*, 102.

### INSANE PERSONS.

1. **CRIMINAL LAW — PRESUMPTION OF INNOCENCE — BURDEN OF PROOF NEVER SHIFTS.** — A person accused of crime is presumed innocent until his guilt is clearly established, and it is incumbent on the state to prove, not only to the satisfaction of the jury, but beyond a reasonable doubt, the presence of every ingredient necessary to constitute the crime charged. Presumptions of fact, however, sometimes stand for full and express proof until the contrary is established; as, that the accused is sane until he proves his insanity. *Commonwealth v. Gerade*, 689.
2. **CRIMINAL LAW — INSANITY AS DEFENSE — EVIDENCE.** — Where insanity is set up as a defense to the crime charged, and the evidence of witnesses shows that the mental condition of the accused was known to them at the time of the commission of the crime charged and afterwards, they are competent to express an opinion as to whether or not he was insane or sane at that time, and also as to his present condition of mind. *Commonwealth v. Gerade*, 689.
3. **CRIMINAL LAW — INSANITY AS DEFENSE — MEASURE OF PROOF — INSTRUCTIONS.** — When insanity is set up as a defense to the crime charged, it must be proved by fairly preponderating evidence; and while a mere doubt as to such insanity will not justify an acquittal, yet it is reversible error to instruct that it must be "clearly proved," although substantially correct instructions as to the measure of proof required are subsequently given. *Commonwealth v. Gerade*, 689.
4. **CRIMINAL LAW — INSANITY AS DEFENSE — BURDEN AND MEASURE OF PROOF.** — When insanity is set up as a defense to the crime charged, it is incumbent on the accused to rebut the presumption of sanity, and show, not beyond a reasonable doubt, nor either clearly or conclusively, but by fairly preponderating evidence, such as is ordinarily required to prove a civil issue, that he was insane at the time of committing the crime charged. *Commonwealth v. Gerade*, 689.
5. **MORAL INSANITY OR UNCONTROLLABLE IMPULSE NOT DEFENSE AGAINST CHARGE OF CRIME.** — In South Carolina, moral insanity or uncontrollable impulse is not a defense against a charge of crime. *State v. Lovell*, 732.  
See ASSAULT; CONSTITUTIONS; CONTRACTS, 1.

### INSOLVENCY.

See ASSIGNMENT, 1; DEBTOR AND CREDITOR, 2; PARTNERSHIP, 1.

### INSTRUCTIONS.

See APPEAL, 2, 4; DAMAGES, 2; INSANE PERSONS, 2; JURY, 10; MALICIOUS PROSECUTION, 11, 12; TRIAL.

### INSURANCE.

1. **CONSTRUCTION OF POLICY.** — The terms of a fire insurance policy should be liberally construed, and if any doubt exists as to their meaning, it should be resolved in favor of the insured, or if the words employed are susceptible of two interpretations, that which will sustain the claim



of the insured should be adopted. *Western etc. Pipe Lines v. Home Ins. Co.*, 703.

**CORPORATION — INSURABLE INTEREST.** — A corporation invested with the right to transport, store, insure, and ship petroleum has an insurable interest in the petroleum in its possession, to the extent of its value, and for the purposes of insurance may be considered as its owner. *Western etc. Pipe Lines v. Home Ins. Co.*, 703.

**INSURABLE INTEREST. — AGENTS, COMMISSION MERCHANTS, OR OTHERS** having the custody and being responsible for property may insure in their own names, and may recover from the insurer not only a sum equal to their own interest in the property by reason of any lien for advances or charges, but the full amount named in the policy, up to the value of the property. *Western etc. Pipe Lines v. Home Ins. Co.*, 703.

**WAIVER — INTEREST.** — When an insurer absolutely denies liability for a loss, he thereby waives the benefit of a provision in the policy giving sixty days for adjustment and payment of loss, and is liable for interest from its date. *Western etc. Pipe Lines v. Home Ins. Co.*, 703.

**LOSS — ADDITIONAL INSURANCE — MEASURE OF DAMAGES.** — Where a policy of insurance provides that, in the event of other or additional insurance, the assured shall recover no greater proportion of the loss than the sum named in the policy bears to the total amount of the insurance, proof of additional insurance, and that the loss is less than the total amount of insurance, will limit the recovery of the assured to the sum stipulated for in the policy, and he is not entitled to recover the market value of the goods destroyed. *German Ins. Co. v. Heiduk*, 402.

**PRESUMPTION AS TO KNOWLEDGE OF INSURER.** — An insurance company when it issues a policy is presumed to know the corporate powers of the insured, the nature of its business, and the usual and customary methods of conducting the business pertaining to the insured property. *Western etc. Pipe Lines v. Home Ins. Co.*, 703.

**PRESUMPTION OF KNOWLEDGE OF INSURER.** — Where an insurance policy is issued without any application or written request, describing the interest of the insured in the property, and it does not appear that any actual representation of any kind was made by the assured, it will be presumed that the policy was written upon the knowledge of the insurer, and intended to cover in good faith the interest of the assured in the property. *Western etc. Pipe Lines v. Home Ins. Co.*, 703.

**DEFENSES — ESTOPPEL.** — Where oil in a tank located at a certain place, and insured against loss by fire, is subsequently destroyed, the insurance company acknowledging the loss and denying liability to pay therefor, on the sole ground that the tank has been removed from its original location by a "visitation of providence" since the insurance issued, it is estopped from subsequently setting up the defense that the oil insured was not the property of the assured. *Western etc. Pipe Lines v. Home Ins. Co.*, 703.

**DEFENSES — ESTOPPEL.** — Where an insurer, after loss, relies upon a specified defense alone, and so notifies the assured, he will not be permitted to retract it, and set up a new and different defense after the insured has acted upon the defense announced, and incurred expense in consequence of it. *Western etc. Pipe Lines v. Home Ins. Co.*, 703.

**PROPERTY REMOVED BY FLOOD — LIABILITY FOR LOSS.** — Where a policy of insurance against loss or damage by fire is issued on oil while contained in a tank situated on certain lands, the fact that the tank has been

removed by a flood about four or five hundred feet from where it stood when such oil was insured, but not off the premises described in the policy, will not avoid the policy, nor relieve the insurer for the loss of such oil by fire after the removal of the tank. *Western etc. Pipe Lines v. Home Ins. Co.*, 703.

11. **REMOVAL OF PROPERTY INSURED — WARRANTY.** — Where oil in a tank located at a certain place is insured against loss by fire, the description of the location of the tank, regarded in the nature of a warranty, can only be construed as a warranty of location at the time the insurance was effected, and that the insured will not voluntarily change its location; but it cannot be construed as an absolute warranty that the tank will remain in the same location during the life of the policy, and if it is removed by flood or any other "visitation of providence," the insurer is liable for the loss of the oil insured if burned while in such tank. *Western etc. Pipe Lines v. Home Ins. Co.*, 703.
12. **LIMITATIONS ON POWERS OF AGENT.** — An insurance company may limit or restrict the powers of its agent, and when such restrictions are known to the person dealing with such agent, the company is bound only by acts of the agent within the scope of the authority conferred. *German Ins. Co. v. Heiduk*, 402.
13. **ADDITIONAL INSURANCE — WAIVER BY AGENT.** — When a policy of insurance contains a condition against additional insurance, without the written consent of the company, and also a condition that no notice to, and consent or agreement by, any local agent shall constitute a waiver of, or affect any condition in, the policy until such consent or agreement is indorsed thereon in writing, the local agent of the insurance company has no authority to verbally waive any of the conditions in the policy. His oral consent to additional insurance will not bind the company, and such insurance renders the policy void. *German Ins. Co. v. Heiduk*, 402.
14. **LIFE INSURANCE — BENEFIT ASSOCIATIONS — REGULATION MAKING INITIATION NECESSARY TO MEMBERSHIP.** — A by-law of a secret order or association which insures the lives of its members, making initiation necessary to membership and the enjoyments of the benefit attaching thereto, is reasonable, and calculated to promote the objects and welfare of the order or association, and is not void as being unreasonable, or opposed to law or public policy. *Martin v. Supreme Lodge*, 886.
15. **ACCIDENT INSURANCE — FIGHTING — CONSTRUCTION OF POLICY.** — When the death of the insured is caused by a gunshot wound inflicted by another, and is the direct result of a mutual encounter or combat, voluntarily entered into by them, no recovery can be had under a policy of accident insurance excepting the company issuing it from liability for death or injury caused by fighting. In such case it is immaterial whether the slayer was sane or insane. *Gresham v. Equitable Acc. Ins. Co.*, 263.
16. **ACCIDENT — DEATH CAUSED BY ASPHYXIA OR SUFFOCATION,** due to the accidental and unconscious inhalation of carbonic-acid or other deadly gas in a well is a death by external, violent, and accidental means, within the meaning of an insurance policy providing that the insurance shall not extend to death caused "by inhaling gas." *Pickett v. Pacific Mut. etc. Ins. Co.*, 618.
17. **ACCIDENT — A CONDITION AGAINST "INHALATION OF GAS"** in an accident insurance policy is used to designate the common uses of gas in dentistry and surgery, and contemplates a voluntary and intelligent act on the part of the insured, and not an involuntary and unconscious act, as

the inhalation of a deadly gas that has unexpectedly accumulated in a well. *Pickett v. Pacific Mut. etc. Ins. Co.*, 618.

18. ACCIDENT — EVIDENCE. — Where neither the insurer's by-laws nor the application of the insured is attached to his policy of accident insurance, as required by statute, they are not admissible in evidence in aid of the policy. *Pickett v. Pacific Mut. etc. Ins. Co.*, 618.

19. CONSTITUTIONAL LAW. — STATUTE MAKING IT CRIMINAL FOR THE AGENT of a life insurance company to pay a rebate to induce a person to effect an insurance in a company is constitutional, and may be enforced against the agent of a foreign insurance company doing business in this state. *People v. Formosa*, 612.

See BENEFICIAL ASSOCIATIONS; CORPORATIONS, 10.

### INTEREST.

See EVIDENCE, 9; GIFTS, 3; INSURANCE, 4; PLEDGE, 2; USURY.

### INTERSTATE COMMERCE.

1. TELEPHONE MESSAGES SENT FROM ONE STATE INTO ANOTHER ARE. — The sending of messages by telephone from one state into another is commerce between the states, and cannot be prohibited by injunction in either state against persons or corporations engaged in sending such messages because they do not pay the taxes assessed against them by such state. But a court of chancery has no authority to go beyond the consideration of the constitutional question, and set aside the assessment as illegal. That can only be done in a court of law. *In re Pennsylvania Telephone Co.*, 462.

2. CONSTITUTIONAL LAW — REGULATION OF COMMERCE. — A STATUTE IMPOSING A TAX UPON CORPORATIONS created in another state, the basis of which is the amount or portion of their capital in use in this state in the transaction of their ordinary business, is not in conflict with the provision of the constitution of the United States conferring upon Congress the power to regulate commerce between the states. When the state permits a foreign corporation to transact business within its limits in its corporate name, and imposes taxes on it for the privilege, this is not a regulation of interstate commerce, but a lawful exercise of the power of taxation upon a corporation that for the time being is within its jurisdiction for that purpose. *People v. Wemple*, 542.

### INTIMIDATION.

See CONTRACTS, 10.

### INVENTORY.

See EVIDENCE, 2.

### IRRIGATION DISTRICTS.

1. CONSTITUTIONAL LAW. — The statute of California, approved March 7, 1887, providing for the organization and government of irrigation districts, and regulating the mode for assessments upon the lands therein with which to meet the bonds authorized by the act, is constitutional and valid. *In re Madera Irr. Dist.*, 106.
2. CONSTITUTIONAL LAW — LEGISLATION AUTHORIZING CREATION OF IRRIGATION DISTRICT — ACCEPTANCE. — It is no objection to a general law

authorizing the creation of a public corporation for district irrigation purposes, that such corporation cannot be created until the terms of the law have been accepted by the affirmative vote of the citizens of the district to be affected. *In re Madera Irr. Dist.*, 106.

3. **CONSTITUTIONAL LAW — STATUTE AUTHORIZING CREATION OF IRRIGATION DISTRICT.** — The mode in which a public corporation for district irrigation purposes may be formed under a general law is within the discretion of the legislature, and cannot be questioned by the courts. It is no valid objection to the law that the organization of the corporation may be compelled by parties within the district not the owners of the land affected thereby, or that no provision is made for a hearing from the owners of such land before the district is organized. *In re Madera Irr. Dist.*, 106.
4. **JURISDICTION, WHEN MUST BE PROVED — ORGANIZATION — EVIDENCE.** — If, in a proceeding to confirm the organization of an irrigation district, under the California statute of March 16, 1889, and also to confirm an order for the issue and sale of its bonds, the organization of the district is denied by answer, competent proof must be produced showing that a petition was presented to the board of supervisors, signed by the required number of *bona fide* freeholders, as required by the statute of March 7, 1887, providing for the organization of such district; and the proper execution of such petition cannot be proved by recitals in the records of the board of supervisors, showing that it was satisfied by evidence of the sufficiency of the petition, nor is the petition itself proper evidence without proof of its execution and sufficiency. *In re Madera Irr. Dist.*, 106.
5. **CONSTITUTIONAL LAW — ORGANIZATION — DESCRIPTION.** — Under the California statute of March 7, 1887, providing that the petition presented to the board of supervisors for the organization of an irrigation district shall particularly describe and set forth the boundaries of such district, they need not be set forth with more particularity than would be necessary in a statute creating a particular district or a municipal corporation, and when the boundaries given embrace a distinct and definite territory, and are not so indefinite that the district cannot be definitely located, they are sufficient to authorize the organization of the district. *In re Madera Irr. Dist.*, 106.
6. **CONSTITUTIONAL LAW — ORGANIZATION — BONDS.** — The board of supervisors to whom petition must be made for the organization of an irrigation district under the California statute of March 7, 1887, is the sole judge of the sufficiency of the bond presented with such petition. *In re Madera Irr. Dist.*, 106.
7. **CONSTITUTIONAL LAW — IRRIGATION DISTRICT INCLUDING ANOTHER MUNICIPAL CORPORATION.** — A statute authorizing the organization of irrigation districts as public corporations, and the issuance of bonds thereby, and regulating the method of assessment and taxation to pay such bonds, is not rendered unconstitutional, nor is the organization of such district rendered invalid by the fact that a city which has been incorporated for another purpose is included within its boundaries. The liability of such city to bear its proportion of such taxation is of the same character as rests upon any of the inhabitants of any city for its proportion of all the indebtedness of the county in which it is situated. *In re Madera Irr. Dist.*, 106.

- 10. CONSTITUTIONAL LAW — LEGISLATION FOR LOCAL IMPROVEMENT — IRRIGATION.** — In determining whether any particular statute, as for the irrigation of arid lands, is for the public advantage, it is not necessary to show that the entire body of the state is directly affected thereby, but it is sufficient that the portion of the state within the district provided for by the act shall be benefited thereby. *In re Madera Irr. Dist.*, 106.
- 11. CONSTITUTIONAL LAW — LEGISLATION FOR LOCAL IMPROVEMENT.** — Whatever legislation tends to an increased prosperity of one portion of the state, or to promote its material development, is for the advantage of the whole state. The right of the legislature to provide for developing the productive capacity of the state, or for increasing facilities for the cultivation of its soil, either by irrigation or drainage, according to the requirements of the different portions thereof, is upheld by its power to act for the public welfare, and particularly of that portion of the public within the district affected by the means adopted for such reclamation. *In re Madera Irr. Dist.*, 106.
- 12. CONSTITUTIONAL LAW — LEGISLATION FOR LOCAL IMPROVEMENT — TAXATION.** — The legislature may provide for a local public improvement for the benefit of a portion of the state, as an irrigation district, and may tax all land within such district, although some of it will receive no benefit, while some land adjacent to and outside the district will be incidentally benefited though not taxed. *In re Madera Irr. Dist.*, 106.
- 13. CONSTITUTIONAL LAW — INDEBTEDNESS.** — A constitutional provision prohibiting certain specified public corporations from incurring indebtedness without the consent of two thirds of their qualified electors is limited to the corporations named, and does not apply to irrigation districts or other public corporations, not named therein, and authorized to be incorporated by statute. As to the latter, the legislature has power to provide the terms and conditions upon which an indebtedness may be created by them, and the amount thereof. *In re Madera Irr. Dist.*, 106.
- 14. ORGANIZATION — ISSUANCE OF BONDS.** — In a proceeding to confirm the organization of an irrigation district, and of an order for the issuance of its bonds, under the California statutes of March 7, 1887, and of March 16, 1889, the fact that the order for the issuance of the bonds is not in strict compliance with the statute will not invalidate the proceedings, as the provisions of the statute may still be followed by the officers of the district when the issuance of the bonds becomes necessary. *In re Madera Irr. Dist.*, 106.
- 15. JUDGMENT CONFIRMING ORGANIZATION — INJUNCTION.** — A judgment confirming the organization of an irrigation district, organized under the California statutes of March 7, 1887, and of March 16, 1889, cannot include an injunction debarring all persons interested in such organization, save the contestants represented, from thereafter disputing, denying, or disclaiming any fact or facts which might have been disputed in such proceeding. The court cannot thus enjoin those interested, against whom there has been no service except by publication of notice, as this is not authorized by such statutes. *In re Madera Irr. Dist.*, 106.

See STATUTES, 4.

## JUDGES.

See COURTS, 1.

## JUDGMENTS.

1. **JUDGMENT RENDERED WITHOUT SERVICE OF PROCESS, NOW RELIEVED AGAINST.** — The proper mode by which to obtain relief against a judgment rendered against a party without service of process is by motion in the original cause, and a complaint in equity which alleges that a judgment of foreclosure was rendered against the plaintiff in a suit in which he was never served with process, and prays for an injunction against such judgment, but which does not state any grounds of equitable cognizance, fails to state a cause of action. *Crocker v. Allen*, 831.
2. **MERGER — RES JUDICATA.** — Where an action is brought in one state to subject a debtor's property to the payment of his debts, a creditor who appears therein by cross-petition and obtains a finding of the amount due him upon a note executed by the debtor, but who does not obtain a personal judgment against him, nor receive anything from the sale of the property under the judgment in that suit, is not estopped from bringing an action on such note in another state. It is not merged in such judgment. *Oackley v. Smith*, 811.
3. **MERGER — RES JUDICATA.** — A cause of action is merged in a judgment only when such judgment was rendered upon the identical cause of action between the same parties or their privies, and after the plaintiff therein had a full and complete opportunity to recover his whole demand. *Oackley v. Smith*, 811.
4. **ESTOPPEL.** — A DECISION UPON DEMURRER is conclusive upon the questions legitimately involved; and where it is made in this court, it cannot be reviewed except by motion for a rehearing. Therefore, if, after such decision, the cause comes up for further hearing in the trial court, permission will not be granted to plead as an estoppel a judgment rendered in one of the national courts determining the same question in an opposite way to the decision of this court upon the demurrer. *Ill. v. Northern Pac. R. R. Co.*, 44.
5. **JUDGMENTS OBTAINED BY FRAUD AS RES JUDICATA.** — Fraud in obtaining a judgment is not concluded thereby, when the defendant therein had no knowledge of the pendency of the action, could not have protected his rights therein, and his failure to defend was not a negligent omission on his part. In such case he is entitled to equitable relief. *Dunlap v. Steere*, 143.
6. **RES JUDICATA — DISMISSAL OF BILL — JURISDICTION.** — Where a bill in equity is dismissed for want of jurisdiction, the dismissal is not upon the merits, and is not a bar to another action between the same parties for the same cause, although the action of the court in dismissing the bill was erroneous. *Weigley v. Coffman*, 667.
7. **JUDGMENTS IN EQUITY — RES JUDICATA — DISMISSAL OF BILL.** — A final decree in equity dismissing a bill upon its merits, without a stipulation against prejudice, is a bar to another bill between the same parties upon the same matter in another court. Such order of dismissal is a bar only when the court has determined that the plaintiff has no title to the relief sought by his bill. *Weigley v. Coffman*, 667.
8. **ESTOPPEL.** — **JUDGMENT AGAINST A MUNICIPAL CORPORATION,** in an action brought by it to recover land which it claimed to hold in trust for the people of the state, and that the same had been dedicated to the public use, where the action could have been defended only by showing that the people of the state were not entitled to maintain such action, in ef-

fact determines the rights of the people of the state, and is conclusive against them. *People v. Holladay*, 186.

1. **JUDGMENT QUIETING PLAINTIFF'S TITLE AGAINST A MUNICIPAL CORPORATION**, when the question litigated was whether or not the property in controversy had been dedicated to public use as a park, and the judgment declares that the defendant has no right, title, or interest in the land, is conclusive in a subsequent action that such land had not been dedicated to such use. *People v. Holladay*, 186.

2. **JUDGMENT AGAINST A CITY IS BINDING UPON THE STATE AND THE PEOPLE THEREOF**, when the question was concerning land which the city claimed to hold in trust as a public park dedicated to public use as such. *People v. Holladay*, 186.

3. **MUNICIPAL CORPORATION IS AUTHORIZED, IN AN ACTION CONCERNING LAND CLAIMED BY IT** to be a public square, to put in issue the alleged rights of the people to the use of such square, and the people of the state are bound by the result of the litigation if it is not collusive. *People v. Holladay*, 186.

4. **EFFECT OF, UPON AFTER-ACQUIRED TITLE**. — Title acquired after issue is joined, not put in issue by a supplemental pleading, is not affected by any judgment which may be rendered in the action; and where the issue upon which plaintiff relied for a recovery was with reference to the dedication of the land sued for as a public park, and the court found that such dedication had not taken place, and therefore gave judgment for the defendant, such finding and judgment cannot preclude a recovery by the same plaintiff upon title acquired after the issue was joined in the first action. *People v. Holladay*, 186.

5. **JUDGMENT, THOUGH CLEARLY ERRONEOUS, IS CONCLUSIVE** as an estoppel. *People v. Holladay*, 186.

6. **JUDGMENTS OBTAINED BY FRAUD — FALSE AFFIDAVIT — EQUITABLE RELIEF**. — The presentation of a willfully false affidavit, for the purpose of obtaining an order for service of summons by publication, is an act of fraud upon the court; and when the judgment which rests upon such service is itself unconscionable, and was obtained without the knowledge of the defendant therein, it will be set aside in equity. *Dunlap v. Steers*, 143.

See **APPEAL**, 1; **ATTORNEY AND CLIENT**, 1; **CORPORATIONS**, 8; **CO-TENANCY**, 2; **COURTS**, 4; **DEBTOR AND CREDITOR**, 3; **EQUITY**, 4, 6, 7; **EXECUTION**, 2, 5-7; **HUSBAND AND WIFE**, 1; **INJUNCTIONS**, 2-4; **IRRIGATION DISTRICTS**, 13; **JURISDICTION**, 1; **JUSTICE OF THE PEACE**; **LIENS**, 1; **MALICIOUS PROSECUTION**, 7; **NEW TRIAL**, 2; **PARTNERSHIP**, 6.

## JUDICIAL SALES.

See **EXECUTORS AND ADMINISTRATORS**, 6.

## JURISDICTION.

1. **IRREGULAR TRANSFER OF BY JUSTICE, AND ASSUMPTION OF BY SUPERIOR COURT**. — The mere filing of pleadings with the county clerk, certified by a justice of the peace in a case pending before him and before trial, does not confer jurisdiction upon the superior court of a matter of which jurisdiction has not been conferred upon it by the constitution, nor does it acquire jurisdiction in such case by subsequently determining that



it has jurisdiction, and by proceeding to trial, and rendering judgment therein. *Arroyo Ditch etc. Co. v. Superior Court*, 91.

2. **ATTACK ON, AFTER TRIAL, UNDER OBJECTION.** — The fact that a litigant, after his objection to the jurisdiction of the superior court has been overruled in a case improperly transferred to it from a justice's court, proceeds, under such objection, to try the case, does not preclude him from subsequently attacking the jurisdiction of the superior court to proceed in the matter. *Arroyo Ditch etc. Co. v. Superior Court*, 91.

See ABATEMENT; APPEAL, 6; CONTEMPT, 2; CORPORATIONS, 7, 9-11; COURTS, 2-4; EQUITY, 1-3, 7; INJUNCTIONS, 5; INTERSTATE COMMERCE, 2; LEGISLATION DISTRICTS, 4; JUDGMENTS, 6; JUSTICE OF THE PEACE, 2; MARRIAGE AND DIVORCE, 5; PARTNERSHIP, 3.

## JURY AND JURORS.

See TRIAL.

## JUSTICE OF THE PEACE.

1. **EXECUTION BASED ON VOID JUSTICE'S JUDGMENT — COLLATERAL ATTACK — INJUNCTION.** — A justice's judgment, in a case in which he sets it aside and orders a new trial, has no legal existence from the time it is thus vacated, and if nothing is done at the time that the case is set for a new trial, he loses all jurisdiction over it, and cannot revive the judgment by subsequently vacating his previous order setting it aside. Hence an execution afterwards issued under such judgment is void, and it may be attacked either directly or collaterally, or its enforcement may be enjoined. *Olsen v. Nunnally*, 296.
2. **JURISDICTION OF JUSTICE'S COURT — VOID ATTEMPT TO TRANSFER JURISDICTION.** — A justice's court has full jurisdiction to determine all questions as to the validity of an "assessment" or "call" made by a private corporation on its stock, when the court has jurisdiction of the amount in dispute, and it has no authority, before trial, to divest itself of jurisdiction by certifying the pleadings to a superior court which has no jurisdiction. The determination of the justice thus seeking to divest himself of jurisdiction has no conclusive effect as a judgment. *Arroyo Ditch etc. Co. v. Superior Court*, 91.

See CORPORATIONS, 7; JURISDICTION; MALICIOUS PROSECUTION, 6, 7, 15; MARRIAGE AND DIVORCE, 3.

## LACHES.

See EQUITY, 3.

## LANDLORD AND TENANT.

1. **LESSEE OF LAND MAY GRANT RIGHT OF WAY OVER IT TO OTHERS, WHEN.** — A lessee of land, entitled to its exclusive possession, may, during the continuance of his term, dispose of and pass to another a right of way over the same, even though he has but an estate for years therein. When the servient and dominant estates are both for years, such right will have all the qualities of an easement during the running of the term, but will cease with the expiration of the estates upon which it depends. *Nashoff v. Mayo*, 455.
2. **ESTOPPEL AGAINST LANDLORD.** — Where a landlord leases the whole of

his building to one lessee, with authority to sublet, and informs a tenant of part of the building of the facts, advising and inducing him to obtain a new lease from such lessee, the landlord and his privies under a subsequent lease are estopped to deny the authority of such original lessee to sublet. *Hill v. Wand*, 288.

3. **RENEWED LEASE IS CONTINUANCE OF ORIGINAL TERM, WHEN.** — When a lease provides for a renewal of the term, the renewed lease is deemed, in equity, a mere continuance of the original term for the protection and preservation of rights acquired therein. *Newhoff v. Mayo*, 455.

See PATENTS; REAL PROPERTY, 1; TAXES, 4.

### LARCENY.

**CONVERSION OF PROPERTY OBTAINED BY FRAUD.** — Where the consent of the owner of a horse to surrender possession for some temporary and legitimate purpose is obtained by a trick or fraud, and the intent of the taker to deprive the owner of his property, and convert it to his own use, is consummated by his total appropriation of such property, he is guilty of larceny. *State v. Woodruff*, 285.

See BURGLARY; INDICTMENT, 2.

### LEASE.

See LANDLORD AND TENANT.

### LEGACIES.

1. **CONFLICT OF LAWS — WILLS.** — **VALIDITY OF BEQUESTS IN FOREIGN WILLS** should be decided by the same law which governs the will in other respects, and hence the validity of such bequests is to be determined by the law of the testator's domicile. *Cross v. United States Trust Co.*, 597.
2. **CONFLICT OF LAWS — PERPETUITIES.** — A trust created by a will made in another state wherein the testator was domiciled, and which would be void if made in this state, as creating a perpetuity forbidden by its laws, will be here enforced with respect to the personal property situated and the legatees residing in this state, if it is valid and enforceable by the laws of the state in which the testator was domiciled when the will was executed and also at the time of his death. *Cross v. United States Trust Co.*, 597.
3. **WILLS.** — **GIFT OF PROPERTY TO A CLASS OF PERSONS**, distributable at a time subsequent to the death of the testator, ordinarily includes all persons in being at the time appointed for the distribution who belong to the class, whether born before or after the death of the testator; but this rule does not prevail when a different intention appears from the will. *Matter of Smith*, 586.
4. **WILL — GIFT TO A CLASS, WHEN DOES NOT INCLUDE PERSONS SUBSEQUENTLY BORN.** — If a testator bequeaths to each of his grandchildren the sum of ten thousand dollars, directing, during the minority of each, and until each shall attain twenty five years of age, that his or her share shall be kept invested and the proceeds paid to his or her mother semi-annually, and in the event of the decease of any mother, the income to be added to the principal fund, and in the event of the death of either of said grandchildren before twenty-five years of age that his or her share shall be divided among the surviving grandchildren, share and share alike, the grandchildren born after the death of the testator are not entitled to any part of the bequest. *Matter of Smith*, 586.

## LEGISLATURE

1. **CONSTITUTIONAL LAW — EXTENT OF LEGISLATIVE POWER.** — The legislature, when not restrained by constitutional provisions, may pass laws affecting a limited portion as well as the entire people of the state. It may make special laws relating only to special districts, or it may legislate directly upon local districts, or it may intrust such legislation to subordinate bodies of a public character in existence or specially created by it for that purpose. *In re Madera Irr. Dist.*, 106.
  2. **CONSTITUTIONAL LAW — EXTENT OF LEGISLATIVE POWER.** — The legislature is vested with the whole of the legislative power of the state, and has authority to deal with any subject within the scope of civil government, except in so far as it is restrained by constitutional provisions. It is the sole tribunal to determine the expediency as well as the details of all legislation. *In re Madera Irr. Dist.*, 106.
  3. **CONSTITUTIONAL LAW — PRESUMPTION AS TO LEGISLATIVE POWER.** — The presumption is, that every legislative act is within the power of the legislature, and he who would except it from the power must point out the particular provision of the constitution by which the exception is made, or demonstrate that it is palpably excluded from any consideration whatever by that body. *In re Madera Irr. Dist.*, 106.
  4. **CONSTITUTIONAL LAW — PUBLIC WELFARE — EXTENT OF LEGISLATIVE DISCRETION.** — The legislature, in attempting to promote the general welfare of the state, and to provide for the material prosperity of its people, may determine the manner and extent to which it will exercise this function of the government, and its determination is limited only by its own discretion, and is beyond the interference of the courts. *In re Madera Irr. Dist.*, 106.
  5. **CONSTITUTIONAL LAW — DOUBTFUL LEGISLATION — POWER OF JUDICIARY.** — In providing for the public welfare, or in enacting laws which in the judgment of the legislature may be expedient or necessary, that body must determine whether or not the measure proposed is for some public purpose. Although a declaration by the legislature that an act proposed by it will be for the public good will not of necessity preclude a judicial investigation therein, nor be conclusive when the act itself is palpably otherwise; still, if the subject-matter is of such nature that there is any doubt of its character, or if by any possibility the legislation may be for the welfare of the public, the will of the legislature must prevail over the doubts of the court. *In re Madera Irr. Dist.*, 106.
  6. **CONSTITUTIONAL LAW — APPROPRIATIONS — LEGISLATIVE DISCRETION.** — In making appropriations of state money for public purposes or for the public good, the state legislature is not limited by necessity alone; and in determining the question, it is vested with a large discretion, which cannot be controlled by the courts, except, perhaps, when its action is clearly evasive. *Daggett v. Colgan*, 95.
  7. **CONSTITUTIONAL LAW — APPROPRIATION TO CELEBRATE ANNIVERSARY.** — The state, under its general authority to provide for the public welfare, unless restrained by its constitution, may make appropriations to celebrate important events in the history of the country, and may confer such power upon municipal corporations. *Daggett v. Colgan*, 95.
- See CORPORATIONS, 10, 11; IRRIGATION DISTRICTS, 3, 9-11; MUNICIPAL CORPORATIONS, 1-4; STATES; STATUTES, 5; TAXES.

## LIBEL.

1. **WHAT IS.** — An article is libelous *per se* which, being published in a newspaper, of certain persons, including the plaintiff, charges that with contracted fanaticism, alleged ladies have perambulated the streets to prevent such newspaper from being purchased; that these ladies brazenly lowered themselves to a level which they would blush, if they possessed modesty, to see described in type; that the time used by them could be more profitably employed in scrubbing their filthy kitchens; that women like them have little Christianity except that which they flaunt on dress parade; and that they are usually indifferently good mothers, wives, and daughters, and are intermeddlers, who accomplish nothing, and neglect the duties God has created for them. *Street v. Johnson*, 42.
2. **ENVELOPE SENT THROUGH MAIL WITH WORDS "BAD DEBT COLLECTING AGENCY" ON IT IS LIBEL.** — It is a libel to send through the mail an envelope having printed on it in large letters the words "Bad Debt Collecting Agency." *State v. Armstrong*, 361.
3. **PRIVILEGED COMMUNICATION.** — A complaint filed in a court of competent jurisdiction, charging the commission of a supposed crime, is, by the code of California, a privileged communication, for which, though false, the complainant cannot be made answerable in a civil action. *Ball v. Rawles*, 174.
4. **A MERE SELLER OF NEWSPAPERS** is not liable though they contain a libel, if he did not know that fact, and his ignorance was not due to negligence on his part, and he had no ground to suppose that the paper was likely to contain libelous matter. *Street v. Johnson*, 42.
5. **SELLER OF A NEWSPAPER CONTAINING A LIBEL** must assume the burden of proving that he did not know that it contained libelous matter. *Street v. Johnson*, 42.
6. **INFORMATION FOR CRIMINAL LIBEL NOT DEFECTIVE BECAUSE MATTER COMPLAINED OF IS PASTED THEREIN.** — An information for criminal libel for sending through the mail an envelope with libelous matter printed on it is not defective because the libel is set out in it by pasting the original envelope thereon and making it a part thereof, instead of inserting it in writing. *State v. Armstrong*, 361.
7. **INFORMATION FOR CRIMINAL LIBEL SUFFICIENT WITHOUT CHARGING WILLFUL AND MALICIOUS PUBLICATION, WHEN.** — Where an information for criminal libel charges that the accused did willfully and maliciously libel and defame the prosecuting witness, by sending to her through the mails an envelope with certain libelous indorsements thereon, it is sufficient, although it does not charge that the matter complained of was willfully and maliciously published. *State v. Armstrong*, 361.
8. **PLEADING — KNOWLEDGE OF LIBEL.** — In a complaint against a vendor of a newspaper containing a libel, it is sufficient to state that he willfully and intentionally sold and delivered the paper, without adding that he knew that it contained the libelous article. *Street v. Johnson*, 42.
9. **EVIDENCE THAT PROSECUTING WITNESS OWED DEBTS NOT ADMISSIBLE, WHEN.** — In a prosecution for criminal libel for sending through the mail, addressed to the prosecuting witness, an envelope with the words "Bad Debt Collecting Agency" printed thereon, evidence that the prosecuting witness owed some debts to persons other than the defendant is not admissible for the defense. *State v. Armstrong*, 361.
10. **JURY JUDGES OF LAW AND FACT IN PROSECUTION FOR LIBEL.** — In prosecutions for libel, under the constitution of Missouri, the jury are

judges of the law as well as of the facts, and are not required to accept the instructions of the court as conclusive; and the court may so instruct them. *State v. Armstrong*, 361.

See AGENCY, 3; EVIDENCE, 13; INDICTMENT, 1.

### LICENSES.

See MUNICIPAL CORPORATIONS, 9-11.

### LIENS.

1. **PRIORITY BETWEEN JUDGMENT AND MORTGAGE LIEN.** — When a second mortgage is given upon express agreement that the first mortgage shall be satisfied with the money advanced, a judgment creditor of the mortgagor whose judgment is docketed before the satisfaction and cancellation of the first mortgage or the recording of the second mortgage, and who subsequently purchases the premises at execution sale under his judgment, without notice of the agreement or nature of the dealings between the parties to the second mortgage, has a lien superior to the rights of the second mortgagee. The latter is not entitled, as against such purchasers, to be subrogated to the rights of the first mortgagee. *Richards v. Griffith*, 153.

2. **PRIORITY OF — SUBROGATION.** — A lien will be kept alive, under some circumstances, in favor of one who has paid the lien-holder, although the latter has satisfied and discharged it of record, but where the equity is a latent one, the lien will not be kept alive to the prejudice of a subsequent *bona fide* purchaser. *Richards v. Griffith*, 153.

See CONSTITUTIONS, 2; CONTRACTS, 2, 3; DEBTOR AND CREDITOR, 3; EXECUTIONS, 5; EXECUTORS AND ADMINISTRATORS, 14; HOMESTEAD, 1; MORTGAGES, 1; PARTNERSHIP, 7; RECEIVERS.

### LIMITATIONS OF ACTIONS.

1. **MUNICIPAL CORPORATIONS.** — THE STATUTE OF LIMITATIONS runs for and against cities, towns, and school districts, as well as for and against individuals. *State v. School District*, 420.

2. **MANDAMUS — STATUTE OF LIMITATIONS AGAINST.** — A proceeding by *mandamus* is an action at law, and may be barred by the statute of limitations. *State v. School Dist.*, 420.

3. **MANDAMUS — STATUTE OF LIMITATIONS AGAINST.** — A proceeding by *mandamus* to compel public officers to perform a public duty is within the operation of a statute of limitations which applies to all claims that may be made the ground of an action at law, in whatever form they may be presented, although such statute does not expressly include a proceeding by *mandamus*. *State v. School Dist.*, 420.

4. **CONSTRUCTION OF "RETURN TO STATE" IN SAVING CLAUSE OF.** — An action on a promissory note made in another state between parties resident there, brought against the maker within six years after his first removal to South Carolina, is not barred by the statute of limitations of that state, since the saving clause of that statute as to persons who "return" to the state includes a person who never was a resident of the state before, but for the first time comes within its limits and takes up his residence there. *Burrows v. French*, 811.

See ADVERSE POSSESSION; DEBTOR AND CREDITOR, 3; EQUITY, 3; EXECUTORS AND ADMINISTRATORS, 1, 14; TRESPASS; WATERCOURSES, 13.

**LIQUIDATED DAMAGES.**

See DAMAGES, 3, 4.

**LOST NOTES.**

See NEGOTIABLE INSTRUMENTS, 7.

**MALICE.**

See HOMICIDE; LABEL, 7; MALICIOUS PROSECUTION, 1.

**MALICIOUS PROSECUTION.**

1. **ACTIONS FOR MALICIOUS PROSECUTION HAVE NEVER BEEN FAVORED**, and are not sustainable, unless the prosecution was actuated by malice, and the party instigating it had no good reason to believe that the law had been violated, and did not act in good faith upon his reasonable belief that the accused was guilty of the offense for which he was prosecuted. *Ball v. Rawles*, 174.
2. **ACTION FOR, MAINTAINABLE WITHOUT ARREST OF DEFENDANT IN ORIGINAL ACTION OR SEIZURE OF HIS PROPERTY.** — An action for malicious prosecution may be maintained, although the original action was begun by civil summons, and the defendant in that action was not arrested nor his property seized. *Smith v. Burrus*, 329.
3. **PROBABLE CAUSE, MALICE NOT NECESSARILY DEDUCIBLE FROM WANT OF.** — In an action for malicious prosecution, the deduction of malice from a want of probable cause is not a necessary one. Malice may be inferred from the want of probable cause, and from the voluntary dismissal of the alleged malicious suit, but such inference is one of fact, to be drawn by the jury under proper instructions. *Smith v. Burrus*, 329.
4. **TO ENTITLE PLAINTIFF TO RECOVER** in an action for his malicious prosecution, he must show that such prosecution on the part of the defendant was malicious and without probable cause. *Ball v. Rawles*, 174.
5. **PROBABLE CAUSE — ADVICE OF ATTORNEY.** — Where there is probable cause for commencing a prosecution for malicious trespass, and the prosecutor, acting upon the advice of attorneys, and believing there is probable cause, in good faith and without malice causes the arrest and prosecution, he is not liable to the defendant for malicious prosecution, notwithstanding one of his purposes in causing the arrest was to prevent the construction of a building on his land. *Jackson v. Linnington*, 300.
6. **PROBABLE CAUSE — ADVICE OF MAGISTRATE.** — If the prosecutor, before instituting a prosecution, fully and fairly stated the facts and circumstances to a justice of the peace, and was advised by him that they constituted a reasonable cause for the arrest of the plaintiff, and he honestly acted in good faith under such advice, no action can be sustained for the prosecution. So held, where the facts stated to the justice were confessedly true, but he was in error in thinking that they constituted a criminal act for which it was proper to issue a warrant of arrest. *Ball v. Rawles*, 174.
7. **JUDGMENT OF A JUSTICE OF THE PEACE DISCHARGING THE ACCUSED** is *prima facie* evidence of want of probable cause for his prosecution. *Bigelow v. Sickles*, 25.
8. **PROBABLE CAUSE — ENFORCEMENT OF CIVIL RIGHT.** — An arrest and prosecution instituted merely to enforce a civil right is without probable

cause, and renders the prosecutor liable for malicious prosecution. *Jackson v. Livingston*, 300.

9. **PROBABLE CAUSE — BELIEF.** — If the prosecutor does not in fact believe the accused to be guilty, the defense of probable cause cannot exist. It is not sufficient that the known facts are such as to create a belief of the guilt of the accused in the mind of an impartial, reasonable man, if they did not create such belief in the mind of the prosecutor. *Ball v. Rawles*, 174.
10. **EVIDENCE IS ADMISSIBLE IN FAVOR OF THE PLAINTIFF TO SHOW WHAT OCCURRED** at the time and place when and where she was charged with the commission of the crime of adultery, if those making the charge were there present and claim that they made such charge on account of what there happened. Such evidence is admissible, not because it tends to prove the innocence of the plaintiff, but because it may tend to show that what occurred did not constitute probable cause for the prosecution, and perhaps it may also be admissible as tending to show innocence of the crime charged. *Bigelow v. Sickles*, 25.
11. **PROBABLE CAUSE, QUESTION OF, HOW SUBMITTED.** — Probable cause is in the nature of a judgment, to be determined by the court upon a special verdict of the jury, and is not to be rendered until after the jury has given its verdict upon the facts by which it is to be determined. It is not necessary that the facts be found in the form of a special verdict. The court may instruct the jury to render their verdict for or against the defendant, according as they shall find facts designated, which the court may deem sufficient to constitute probable cause. *Ball v. Rawles*, 174.
12. **PROBABLE CAUSE — INSTRUCTIONS DEFINING.** — It is not competent for the court to give to the jury a definition of probable cause, and instruct them to find for or against it, according as they may determine that the facts are within or without that definition. It must instruct the jury upon this subject in the concrete, and not in the abstract, and must not leave to that body the office of determining the question, but must itself determine it, and direct the jury to find its verdict according to such determination. The court should group, in its instructions, the facts which the evidence tends to prove, and then instruct the jury that if such facts be established, there was or was not probable cause, as the case may be, and that their verdict must be accordingly. *Ball v. Rawles*, 174.
13. **THE EXISTENCE OF PROBABLE CAUSE** for a prosecution is always a matter of law to be determined by the court. If the facts are undisputed, the court must order a nonsuit, or direct a verdict for the defendant if they constituted probable cause, and if they did not, then that the other issues must be submitted to the jury. When the facts are contradicted, they must be passed upon by the jury before the court can determine the issue of probable cause, but in either contingency, the question is still one of law, to be determined by the court from the facts established in the case. *Ball v. Rawles*, 174.
14. **PROBABLE CAUSE — QUESTION FOR JURY.** — Whether a prosecutor believed the accused guilty of the crime charged is a question of fact to be submitted to the jury. *Ball v. Rawles*, 174.
15. **DAMAGES, WHEN NOT EXCESSIVE.** — A verdict for five thousand dollars for plaintiff, a married woman, is not excessive when the evidence shows that she had for a long time been subjected to outrageous treatment and abuse by the defendants, culminating in her prosecution before a justice of the peace on a charge of adultery. *Bigelow v. Sickles*, 25.



- 26. PREPONDERANCE OF EVIDENCE SUFFICIENT IN ALL CIVIL ACTIONS.** — A preponderance of evidence is, in all civil actions, sufficient to make out a case for either litigant. The plaintiff, therefore, in a suit for malicious prosecution, founded on an action for slander and its voluntary dismissal, is only bound to establish the truth of the slanderous words by a preponderance of evidence. *Smith v. Burrus*, 329.
- 27. MALICE, VOLUNTARY DISMISSAL OF CIVIL SUIT NOT PRIMA FACIE EVIDENCE OF.** — The voluntary dismissal of a civil suit by the plaintiff therein will not, in a subsequent suit against him for malicious prosecution, constitute *prima facie* evidence of malice. *Smith v. Burrus*, 329.

## MANDAMUS.

See LIMITATIONS OF ACTIONS, 2, 2.

## MANSLAUGHTER.

See HOMICIDE, 2.

## MARGINS.

See BROKERS.

## MARRIAGE AND DIVORCE.

- 1. CONDONATION, WHAT AMOUNTS TO, AND HOW LIMITED.** — A wife by voluntarily having sexual intercourse with her husband, after she knows that he has committed adultery, and that she can prove it, thereby condones his offense. But condonation in such cases is always conditional and limited, and the party forgiven must, to retain the benefit of the pardon, treat the other in the future with conjugal kindness and fidelity; and as a general rule, the pardon extends only to such offenses as are known to the pardoning party when the intercourse occurs. *Shackleton v. Shackleton*, 478.
- 2. CONDONATION BY WIFE NOT IMPLIED FROM SEXUAL INTERCOURSE WHEN.** — The rule that condonation may be implied from sexual intercourse is not enforced so rigorously against a wife as it is against a husband, especially where she is entirely without means, and wholly dependent on him for everything. And where, at the time a wife permitted her husband to have sexual intercourse with her, she did not know and could not prove, but merely believed upon suspicion, that he had committed adultery, it will not be presumed that she intended to condone his offense. *Shackleton v. Shackleton*, 478.
- 3. DESERTION** is the voluntary separation of one spouse from another without justification, and with an intention of not returning. *Williams v. Williams*, 517.
- 4. DESERTION BY A WIFE, CAUSED BY HER HUSBAND PROHIBITING** her from seeing or communicating with her mother, and his informing her that she could not go with him if she wanted to see or communicate with her mother, does not constitute any cause for divorce. *Williams v. Williams*, 517.
- 5. DIVORCE ENTERED IN ANOTHER STATE** against a wife, who, at her marriage and ever afterwards, resided in this state, and who never appeared in the suit, is void as against her in this state, though she was personally served with process, but outside of the territorial jurisdiction of the court granting the divorce. *Williams v. Williams*, 517.

See EXECUTION, 1; PARENT AND CHILD, 2.

**MARRIED WOMEN.**

See **BOUNDARIES, 6; HUSBAND AND WIFE; MARITAL PROMISES, 11.**

**MASTER AND SERVANT.**

1. **EMPLOYER'S LIABILITY FOR NEGLIGENCE OF INDEPENDENT CONTRACTOR.** — When an individual or corporation contracts with another individual or corporation exercising an independent employment for the latter to do a work not in itself unlawful or attended with danger to others, such work to be done according to the contractor's own methods, and not subject to the employer's control or orders, except as to the results to be obtained, the employer is not liable for the wrongful or negligent acts of the contractor or his servants. *Atlanta etc. R. R. Co. v. Kimberly*, 231.
2. **EMPLOYER WHEN LIABLE FOR INDEPENDENT CONTRACTOR'S ACTS.** — When work is wrongful in itself, or if done in the ordinary manner must result in a nuisance, the employer is liable for injury resulting to third persons, although the work is done by an independent contractor. *Atlanta etc. R. R. Co. v. Kimberly*, 231.
3. **INDEPENDENT CONTRACTOR — LIABILITY OF EMPLOYER.** — An employer may make himself liable for the negligence of an independent contractor by retaining the right to direct and control the time and manner of executing the work, or by interfering with the contractor and assuming control of all or part of the work, so that the relation of master and servant arises, or so that the injury is traceable to his interference. But mere supervision to ascertain that the contractor performs his contract, or reserving the right to dismiss incompetent workmen, will not render the employer liable. *Atlanta etc. R. R. Co. v. Kimberly*, 231.
4. **INDEPENDENT CONTRACTOR — LIABILITY OF EMPLOYER.** — An employer is liable when he has ratified or adopted the unauthorized acts and wrongs of an independent contractor. *Atlanta etc. R. R. Co. v. Kimberly*, 231.
5. **INDEPENDENT CONTRACTOR — LIABILITY OF EMPLOYER.** — Where, according to previous knowledge and experience, the work to be done by an independent contractor is in its nature dangerous to others, the employer, and not the contractor, is liable for an injury inflicted in the performance of the work; and the rule is the same when the wrongful act done by the contractor is the violation of a duty imposed by express contract or by statute upon the employer. *Atlanta etc. R. R. Co. v. Kimberly*, 231.
6. **IF A SERVANT ACTS WITHOUT REFERENCE TO THE SERVICE** in which he is employed, to effect some independent purpose of his own, his master is not answerable. The test of the master's responsibility for the act of his servant is, not whether such act was done according to the instructions of the master to the servant, but whether it was done in the prosecution of the business which the servant was employed by the master to do. *Stephenson v. Southern Pac. Co.*, 223.
7. **LIABILITY OF MASTER FOR ACT OF SERVANT.** — In order to hold a master liable for the act of his servant, it is not necessary that the latter should have authority to do the particular act in question; but it must be done within the scope of his general authority, in furtherance of the master's business, and for the accomplishment of the object for which the servant is employed; and whether the act can be implied from the general authority conferred upon him depends upon the nature of the services he is engaged to perform, and the circumstances of each particular case. *International etc. R'y Co. v. Anderson*, 902.

- MASTER'S LIABILITY FOR TORT OF SERVANT.** — If a servant steps aside from his master's business, for however short a time, to commit a wrong not connected with such business, the relation of master and servant is, for the time being, suspended, and therefore the master is not answerable for the wrong. *Stephenson v. Southern Pac. Co.*, 223.
- LIABILITY OF MASTER FOR WRONGFUL ACT OF SERVANT.** — When a servant performs the duty for which he is engaged in a wrongful manner, and to the injury of another, the master is liable, although he may have expressly forbidden the particular act. *International etc. Ry Co. v. Anderson*, 902.
- NEGLECT.** — The test of liability of an employer to an employee for injury received in the course of the employment is negligence, and not danger. *Kehler v. Schoenk*, 633.
- STATE — RISKS ASSUMED IN ENTERING INTO EMPLOYMENT OF.** — One who enters the service of the state assumes all the risks attending such employment, whether arising from its ordinary perils, or resulting from the negligence or misfeasance of other servants of the state, and an appropriation to indemnify such servant for injuries sustained while in such service is a mere gratuity. *Bourn v. Hart*, 203.
- MASTER MUST FURNISH SAFE APPLIANCES, AND KEEP THEM IN REPAIR.** — It is the duty of a master to furnish to his servant, for the performance of the work required of him, safe and suitable appliances, such as a reasonable and prudent person would ordinarily use under similar circumstances, and also to see that the same are kept in proper repair; and these duties cannot be delegated to another so as to relieve the master from liability for injuries sustained by reason of a failure to perform them properly. *Carter v. Oliver Oil Co.*, 815.
- DUTY TO FURNISH SAFE MACHINERY.** — When the machinery furnished by a master for the use of his servant is of the kind in common use for the same purpose, the master is justified in using it, and will not be liable for an injury caused thereby, unless he has information or reason to believe that its use is attended with danger, or that a safer kind of machinery is in common use for doing the same kind of work. *Nix v. Texas Pac. Ry Co.*, 897.
- DUTY TO FURNISH SAFE MACHINERY.** — An employer is bound to furnish machinery and appliances of ordinary character and reasonable safety, and the former is the conclusive test of the latter. *Kehler v. Schoenk*, 633.
- SERVANT HAS RIGHT TO ASSUME THAT APPLIANCES FURNISHED HIM ARE SAFE.** — A servant has a right to assume, without inquiry or examination, that the appliances furnished him are safe and suitable. *Carter v. Oliver Oil Co.*, 815.
- DUTY TO FURNISH SAFE MACHINERY — CONTRIBUTORY NEGLIGENCE OF SERVANT.** — A master is bound to use only ordinary care in furnishing safe machinery for the use of his servant, and if there is more danger in the use of the kind furnished than that in common use, and the servant knows it, or by the exercise of ordinary care and prudence should know it, he cannot recover for injuries caused by its use. *Nix v. Texas Pac. Ry Co.*, 897.
- MACHINERY IN GENERAL USE — EMPLOYER'S DISCRETION.** — Where there are several appliances in general use for the performance of a particular kind of work, the choice between them being a matter of judgment de-

pending on surrounding conditions, an employer has the absolute discretion to select according to his own judgment. *Kahler v. Schwenk*, 682.

18. **VICIN-PRINCIPALS.** — While mere grades of rank of employees of a railway company engaged in a common employment will not destroy the relation of fellow-servants, yet where one is authorized to employ and discharge servants working under him and under his direction and control, his negligence is that of the master. *Nix v. Texas Pac. Ry Co.*, 897.

See NEGLIGENCE, 2; RAILROADS, 3-6, 9-11; STATES, 1; STATUTES, 7; TELEGRAPHER, 1.

### MENACE.

See CONTRACTS, 10-12.

### MENTAL ANGUISH.

See DAMAGES, 1; RAILROADS, 14; TELEGRAPHER, 2.

### MERGER.

See JUDGMENTS, 2, 3.

### MISDEMEANOR.

See PLEADING, 1.

### MISTAKE.

See EQUITY, 5; EVIDENCE, 1.

### MORTGAGE.

1. **MORTGAGEE HAS NO LIEN ON RENTS AND PROFITS OF MORTGAGED LAND.** — A mortgagee has no specific lien upon the rents and profits of mortgaged land, unless it is so stipulated in the mortgage. In South Carolina, the mortgagor still remains, even after condition broken, the owner of the mortgaged premises, and retains all the rights incident to such ownership, among them the right to receive the rents and profits. *Hardin v. Hardin*, 786.
2. **ESTOPPEL — CREDITOR NOT ESTOPPED BY CLAIMING SURPLUS IN FORECLOSURE, WHEN.** — A creditor, by claiming a surplus arising from the foreclosure of a deed of trust, will not be estopped from questioning its validity, on the ground that it was made in fraud of creditors, when the objection is raised by one who was a party to the fraud. *Mytarn v. Mitchell*, 250.
3. **ESTOPPEL — MORTGAGOR RETAINING PROCEEDS OF MORTGAGE SALE ESTOPS HIM FROM DENYING PURCHASER'S TITLE, WHEN.** — Where a mortgagee, after a defective exercise of the power of sale in a mortgage, receives the surplus proceeds of the sale, without knowledge of the defects in the sale, but retains such proceeds after he learns of such defects, he will be estopped from denying the purchaser's title. He cannot be permitted to repudiate the mortgage sale, and at the same time insist upon having the benefit of it. *Brewer v. Nash*, 749.

See APPEAL, 1; CORPORATIONS, 8; CO-TENANCY, 2; DEBTOR AND CREDITOR, 2, 3; DEEDS, 10; INJUNCTION, 4; LIENS, 1; PARTNERSHIP, 7; RECEIVERS.

## MUNICIPAL CORPORATIONS.

1. **CONSTITUTIONAL LAW — LEGISLATION CREATING PUBLIC CORPORATIONS.** — The legislature may by general laws authorize the inhabitants of any district, under such restrictions and with such preliminary steps as it may deem proper, to organize themselves into a public corporation for the purpose of exercising governmental duties, and such corporations are not required to be formed in the same manner, nor provided with the same powers, as other public or municipal corporations of a different class. *In re Madera Irr. Dist.*, 106.
2. **CONSTITUTIONAL LAW — LEGISLATION CREATING PUBLIC CORPORATIONS UNDER GENERAL LAWS.** — The general laws which the legislature may enact for the creation and organization of public corporations may be as numerous as the objects for which such corporations may be created, and as they are only the representatives or agents of the legislature in the various localities of the state, the requirements for organization may vary with the character of the purpose for which they may be created. *In re Madera Irr. Dist.*, 106.
3. **CONSTITUTIONAL LAW — LEGISLATION CREATING PUBLIC CORPORATIONS — POWERS CONFERRED.** — The legislature is authorized, under its general power of legislation, to invest public corporations, when created by it, with the same powers it could itself have exercised; and in providing for such organizations, it need confer upon them only such powers, as in its judgment are proper to be exercised by them in the discharge of the particular functions of government which may be conferred upon them. *In re Madera Irr. Dist.*, 106.
4. **CONSTITUTIONAL LAW. — MUNICIPAL CORPORATIONS WHICH MAY BE CREATED BY GENERAL LAWS** are not limited to towns and cities, but the legislature may authorize the formation of such corporations for any public purpose whatever. *In re Madera Irr. Dist.*, 106.
5. **MUNICIPAL CORPORATIONS ARE, FOR MANY PURPOSES, BUT DEPARTMENTS OF THE STATE**, organized for the more convenient administration of certain powers belonging to the state, and in their management and control of streets and parks within their limits, and in actions for the vindication and preservation of the public rights therein, exercise a part of the sovereignty of the state. *People v. Holladay*, 186.
6. **JUDGMENTS — MUNICIPAL CORPORATIONS, WHEN REPRESENT THE PEOPLE.** — Municipal corporation having full power and jurisdiction over the public squares within its limits, with a right to sue and be sued, is authorized to maintain and defend all actions relating to its right to subject to the public use squares and land claimed by it to have been dedicated for such purposes, and in any action brought or defended by it, it represents the people of the state for the purpose of preserving the public rights of which it is the trustee. *People v. Holladay*, 186.
7. **SESSION OF CITY COUNCIL — VALIDITY OF ORDINANCE.** — When the mayor of a city and all the members of its common council meet in special session and act as a body, they may, at such meeting, or at any adjourned session thereof at which a quorum is present, legally pass any ordinance within their power, notwithstanding no written call for such special session, specifying its purpose, was made by the mayor or two councilmen as required by law. *Magneau v. City of Fremont*, 436.
8. **ORDINANCE — PASSAGE OF.** — Under the Nebraska statutes, the council of any city of the second class having more than five thousand inhabitants may, when lawfully in session, pass any ordinance by the concurring

vote of a majority of the members of such council, or by the affirmative vote of one half thereof with the concurrence of the mayor. *Magnus v. City of Fremont*, 436.

9. **OCCUPATION TAX — ORDINANCE VOID IN PART — PENALTY.** — While the penal provision for the enforcement of an ordinance imposing an occupation or license tax is void, that does not invalidate its other valid parts when such parts form a complete ordinance, and are not dependent upon the void portion. *Magnus v. City of Fremont*, 436.

10. **OCCUPATION TAX — CONSTITUTIONALITY.** — An ordinance imposing an occupation tax or license fee for the privilege of carrying on certain kinds of business in a city, making no exceptions in favor of or against any one carrying on each business taxed, but operating uniformly on each class to which it applies, is not rendered unconstitutional for want of uniformity, from the fact that it does not classify each business taxed, and graduate the amount that shall be paid by the person pursuing such business according to the amount of business done by him. *Magnus v. City of Fremont*, 436.

11. **OCCUPATION TAX — CONSTITUTIONALITY OF.** — Under a constitution providing that the legislature shall, by general law, provide needful revenue by levying taxes by valuation, which shall be uniform as to the classes upon which they operate, and that the legislature may vest municipal corporations with power to assess and collect taxes which shall be uniform in respect to persons and property affected, the legislature may, by general law, confer power upon cities and towns to impose occupation or license taxes for municipal purposes. The only restriction imposed is, that the taxes so levied shall be uniform as to class. *Magnus v. City of Fremont*, 436.

12. **ABUTTING OWNER ENTITLED TO INJUNCTION TO RESTRAIN CITY COUNCIL FROM PAYING CONTRACTOR FOR IMPERFECT STREET WORK, WHEN.** — The owner of a city lot abutting on a street which is being paved in an imperfect manner, under a contract with the city, has a right in equity to an injunction to restrain the common council from paying for such imperfect work before a trial at law, where his property will be assessed for part of the cost thereof. But this is the complement of relief to which he is entitled, for a court of equity has no right to try and definitely settle the question between the city and the contractor, whether their contract has been or is being executed according to its terms. A court of law is the proper forum for the determination of that question, and a court of equity will not take cognizance of controversies that are alien to its genius and its methods of procedure. The bill in such case should be exhibited for the relief of the complainant, and also for all other land-owners similarly situated who desired to come in, and should show distinctly that the common council had been called upon to perform the duty the not doing of which forms the basis of complaint. *Lodor v. McGovern*, 446.

13. **VACATION OF STREET — SALE OF VACATED LAND.** — A city, possessing the absolute title to its streets and the power to vacate them, may, upon regularly vacating a street for the public good, and after a tender of fair damages to the abutting owners, grant or sell the land thus vacated to private parties. The title thereto does not revert to the abutting owners. *Lindsay v. Omaha*, 415.

See CLOUD ON TITLE; CORPORATIONS, 7; DEDICATION; HIGHWAYS, 1-3; IN-

REASON DEFENSES; JUDGMENTS, 8-11; LEGISLATURE, 7; LIMITATIONS OF ACTIONS, 1; OFFICE AND OFFICERS, 4; SCHOOLS, 1; STATUTES, 4, 5.

**MUNICIPAL FINE.**

See CORPORATIONS, 7.

**MURDER.**

See HOMICIDE.

**MUTUAL BENEFIT SOCIETIES.**

See BENEFICIAL ASSOCIATIONS.

**NEGLIGENCE.**

1. **WHEN ANY VOLUNTARY ACT MAY NATURALLY RESULT IN INJURY TO ANOTHER**, the actor must see to it, at his peril, that injury does not follow, or he must respond in damages therefor, no matter what the motive or the degree of care with which the act is performed. *Mastin v. Levagood*, 277
2. **CONTRACT RELATIONS.** — When an act of negligence is imminently dangerous, the actor is liable to a party injured, whether there is any relation of contract between them or not. *Mastin v. Levagood*, 277.
3. **MASTER AND SERVANT — DANGEROUS MACHINERY — NEGLIGENCE.** — The owners of a thrashing-machine are guilty of gross negligence in leaving its bevel wheel and cogs uncovered, knowing them to be thus imminently dangerous to human life. A laborer about the machine, who, being ordered to oil the cylinder, is injured while attempting to perform such act, by coming in contact with such bevel wheel and cogs without knowledge of their dangerous condition, may recover from the owners of the machine, whether he was their servant at the time or not. *Mastin v. Levagood*, 277.
4. **NEGLIGENCE — DANGEROUS MACHINERY — DUTY OF OWNER.** — Where the dangerous condition of machinery is foreseen and pointed out to the owner, the duty is imposed upon him to adopt every possible precaution to avoid injury to those working about it. His failure to perform such duty makes him liable for all resulting injury. *Mastin v. Levagood*, 277.
5. **NEGLIGENCE OF RESPONSIBLE AGENT INTERVENING BETWEEN DEFENDANT'S NEGLIGENCE AND DAMAGE SUFFERED BREAKS CAUSAL CONNECTION, WHEN.** — When the independent act of a responsible person intervenes between the defendant's negligence and the injury sustained, such act breaks the causal connection between the negligence and the damage, and he who is guilty of the original negligence is not chargeable, but redress must be sought from him who directly caused the injury, unless the intervening act is such as might reasonably have been anticipated as the natural or probable result of the original negligence, in which latter case the original negligence will be regarded as the proximate cause of the injury, and will render the person guilty of it chargeable. Where, therefore, a person driving on a country highway meets another, also driving, who fails to turn out, as required by statute, and the former is compelled to drive upon the side of the road and is injured by colliding with a post in the highway standing outside of but near to the traveled part, the town will not be liable for the injury, but the



person whose independent act was the proximate cause of the injury will be liable therefor. *Mahogany v. Ward*, 753.

6. CONTRIBUTORY NEGLIGENCE — DEFENSE OF, CANNOT BE CONSIDERED UNDER MOTION FOR NONSUIT. — In South Carolina, the question of the plaintiff's contributory negligence cannot be considered under a motion for a nonsuit. *Carter v. Oliver Oil Co.*, 815.
  7. QUESTION OF, TO BE DETERMINED BY JURY. — The question whether or not the testimony adduced is sufficient to prove negligence is exclusively to be determined by the jury. *Carter v. Oliver Oil Co.*, 815.
  8. DEATH OF PARENT — UNBORN CHILD MAY RECOVER FOR. — A child unborn at the time of the negligent killing of its parent in the employ of a railway company is entitled to recover damages therefor as a surviving child. *Texas etc. R'y Co. v. Robertson*, 929.
- See BANKS AND BANKING, 3-7; CORPORATIONS, 8; EQUITY, 5; INFANTS; INNKEEPERS, 4; JUDGMENTS, 5; LIBEL, 4; MASTER AND SERVANT, 1, 2, 10, 16, 18; RAILROADS, 6-8, 10, 16, 18, 21; STATES; TELEGRAPHS, 2.

### NEGOTIABLE INSTRUMENTS.

1. PLACE OF DELIVERY OF NOTE DEPOSITED IN THE MAIL. — The place where a note is made is not the place where it is written, signed, and dated, but the place where it is delivered. Where, therefore, a promissory note is drawn by the payee in Baltimore and forwarded to the maker in New York, where it is signed by him and returned by mail to Baltimore, such note is to be deemed as made in New York. By depositing the note in the mail with the intent that it shall be transmitted to the payee in the usual way, the maker parts with his dominion and control over it, and the delivery is in legal contemplation complete. *Barrett v. Dodge*, 777.
2. A NOTE ACQUIRED AS SECURITY FOR A PRE-EXISTING DEBT is open to the defense that it was made for one purpose and had been used for another. *United States Nat. Bank v. Ewing*, 615.
3. EVIDENCE — BURDEN OF PROOF. — WHEN A NOTE has been obtained from the maker by practicing a fraud on him, one who seeks to recover thereon must assume the burden of proving that he is a *bona fide* purchaser. *Joy v. Diefendorf*, 484.
4. INDORSEMENT MADE FOR THE ACCOMMODATION OF THE MAKER, UPON HIS EXPRESS ASSURANCE that the instrument would be negotiated only in another state, cannot be enforced against the indorser, if, contrary to the agreement, it is negotiated in this state to one who has not parted with anything, nor made any new agreement in reliance upon it, and who received it merely as additional security for an antecedent debt. *United States Nat. Bank v. Ewing*, 615.
5. PAROL EVIDENCE IS ADMISSIBLE TO PROVE that an indorsement was made upon the express agreement that the note indorsed should be negotiated at a specified place only. *United States Nat. Bank v. Ewing*, 615.
6. PROMISSORY NOTE, LAW OF PLACE WHERE MADE DETERMINES CONSTRUCTION OF, WHEN. — If no particular place of payment is specified in a promissory note, the law of the place where it is made determines not only its construction, but also the obligation and duty it imposes upon the maker. And the maker may, therefore, avail himself of any equitable defenses given to him by the law of the place where the note was made. *Barrett v. Dodge*, 777.

1. **LOST NOTE — ACTION AT LAW MAINTAINABLE UPON, WHEN.** — An action at law lies upon a promissory note indorsed to the plaintiff before maturity, and by him lost after its maturity, and all that the plaintiff in such action is required to show to entitle him to a recovery is, that the defendant can pay the note without the hazard of being required to pay it a second time. *Adams v. Baker*, 721.
2. **PURCHASER IN GOOD FAITH — EVIDENCE.** — The possession of a negotiable instrument, acquired in good faith and in the usual course of trade, constitutes the holder a purchaser, whether the person from whom it was received had title or not, and the rule is not affected by the fact that the statute omits the words "in the usual course of trade," as the *mala fides* of the transaction may always be established by circumstantial evidence. *Wilson v. Denton*, 908.
3. **PURCHASER IN GOOD FAITH.** — A promissory note given by the purchaser of a negotiable instrument, claimed to have been acquired in good faith in the usual course of trade, is a valuable consideration, though its inadequacy may be shown on the issue of good faith. *Wilson v. Denton*, 908.
- See** AGENCY, 2; BILLS OF LADING; HUSBAND AND WIFE, 2; LIMITATIONS OF ACTIONS, 4; PARTNERSHIP, 6; USURY.

### NEW TRIAL

1. **NEWLY DISCOVERED EVIDENCE NOT GROUND FOR NEW TRIAL, WHEN.** — A new trial will not be granted on the ground of newly discovered evidence, where the moving party fails to show that he could not, by the exercise of reasonable diligence, have discovered such evidence in season to have used it on the trial, and does not state any excuse for not having then produced it. *Barrett v. Dodge*, 777.
2. **VERDICT — WHEN EXCESSIVE.** — In actions where there is no fixed legal rule of compensation, the verdict of the jury is conclusive, unless it is influenced and misled by corruption, passion, or prejudice; and when the amount of the verdict is such as to shock a sense of justice, and must have been the result of passion or prejudice on the part of the jury, the judgment rendered in accordance therewith will be reversed as excessive. *Western U. Tel. Co. v. Houghton*, 918.
3. **DEFINITION.** — WORD "THEREUPON," in the sentence "thereupon the defendants filed in writing their motion for a new trial," appearing in the record immediately after the verdict, is to be construed as an adverb of time, and means without delay or lapse of time. *Hill v. Wand*, 288.
4. **APPELLATE PRACTICE — INJURY WHEN NEED NOT BE SHOWN.** — ORDER SUSTAINING OBJECTION TO A QUESTION CALLING FOR EVIDENCE ADMISSIBLE as part of the *res gestae* entitles the party whose evidence is excluded to a new trial, though there is nothing to show whether or not the evidence would have been material had it been admitted. *Hermes v. Chicago etc. R'y Co.*, 69.
5. **NEW TRIAL IN CRIMINAL CASES — STATEMENT AND COMMENT BY COUNSEL AS TO FACTS NOT IN EVIDENCE.** — Where, on the trial of a criminal case, counsel for the prosecution is permitted, in the presence of the jury, to state facts not in evidence, imputing a violent character to the accused, and to comment upon them in argument to his prejudice, he is entitled to a new trial, although the jury is instructed to disregard all statements and comments of counsel as to any matter not in evidence. *People v. A. A. Lee*, 103.

See APPEAL, 7.

**NONSUIT.**

See MALICIOUS PROSECUTION, 13; NEGLIGENCE, 6; TRIAL, 2.

**NOTICE.**

See CONTRACTS, 9; HOMESTEAD, 1-3; INJUNCTIONS, 4; IRRIGATION DISTRICTS, 13; TELEGRAPHS, 6; VENDOR AND PURCHASER, 4; WATERCOURSES, 6.

**NUISANCE.**

1. **INDEPENDENT TRESPASSERS — LIABILITY OF EACH.** — Where an injury to lands from the accumulation of refuse from coal works is the result of independent acts of trespass by two or more persons, each act is a separate cause of action for that portion of the injury done by it, although the exact damage may be difficult of ascertainment. Such independent acts do not constitute the several actors joint trespassers because the general consequences become united, nor will a release granted to one of them relieve the others from their liability for a proportionate amount of the damages caused by the independent act of each of them. *Gallagher v. Kemmerer*, 673.
2. **UNDESIRABLE BUSINESS.** — An adjoining land-owner is without legal remedy for the depressing effects upon its desirability and market value, caused by the proximity of an undesirable business; but if such business is conducted in such manner as to injuriously affect the use of such land or its occupants, the owner may recover damages therefor. *Robb v. Carnegie*, 694.
3. **COKE MANUFACTORY — INJUNCTION.** — A coke manufactory, conducted in a careful manner upon an appropriate site, but which substantially injures the crops and soil of an adjoining owner, will not be restrained by injunction, but such owner is entitled to recover actual damages in an action at law. *Robb v. Carnegie*, 694.
4. **COKE MANUFACTORY — INJURY TO ADJOINING LAND.** — One engaged in manufacturing coke from coal purchased at a remote place is liable in actual damages for substantial injury to the crops and land of an adjoining owner, caused by the smoke and vapors necessarily arising from such business, conducted in careful manner, upon an appropriate site owned by the manufacturer. *Robb v. Carnegie*, 694.
5. **COKE MANUFACTORY — MEASURE OF DAMAGES — EVIDENCE.** — In an action by an adjoining owner to recover for injury to his crops and soil, arising from a coke manufactory, situated on a well-selected and secluded site, and carefully operated, such owner is entitled to recover only his actual loss in the products of his farm or the destruction of his soil, or both, sustained within the period of the statute of limitations. He is not entitled to exemplary damages, nor is the rule as to damages for a taking by eminent domain applicable; and evidence which does not tend to prove the actual damages sustained is inadmissible. *Robb v. Carnegie*, 694.

See MASTER AND SERVANT, 2; RAILROADS, 11.

**OCCUPATION TAX.**

See MUNICIPAL CORPORATIONS, 9-11.

**OFFICERS.**

1. **OFFICER AND DEPUTY.** — THE FORGERY OF ORDERS OR WARRANTS BY A DEPUTY superintendent of county schools, and their sale to a banking

corporation, is not in the line of his official duty, and therefore his principal is not answerable therefor. *Fresno Nat. Bank v. Hawkins*, 221.

**2. OFFICER'S LIABILITY FOR ACT OF DEPUTY.** — THE INDORSEMENT ON FOREIGN ORDERS OR WARRANTS OF THE DATE OF THEIR FILING, when the law requires warrants to be filed in the order of their presentation, is not a guaranty that the warrants so filed are genuine or will be paid. The indorsement does not give them negotiability, and one who purchases in reliance on the indorsement cannot recover of the officer whose deputy made it, on proof that the warrants were forged by such deputy. *Fresno Nat. Bank v. Hawkins*, 221.

**3. OFFICERS DE FACTO — EFFECT OF ACTS OF.** — The acts of *de facto* officers, so far as they involve the interests of the public or third persons, are valid. *Magneau v. City of Fremont*, 436.

**4. OFFICERS DE FACTO — CITY COUNCILMEN — EFFECT OF ACTS OF.** — City councilmen holding over after their term of office has expired, and after their successors have been elected and have qualified, but before the latter have taken their seats, are *de facto* officers, and their acts are valid. *Magneau v. City of Fremont*, 436.

**5. SCHOOL OFFICERS — ACCEPTANCE OF OFFICE — OFFICER DE JURE — VACANCY.** — A person elected to an office in a school district, who, failing to file his written acceptance thereof, as required by law, immediately enters upon the discharge of the duties of his office, and performs all such duties required of him by law for more than a year without objection, thereby becomes an officer *de jure*, and no vacancy exists on account of his failure to file his acceptance. *Frans v. Young*, 412.

See IRRIGATION DISTRICTS, 12; PUBLIC LANDS; SCHOOLS, 2; SHERIFFS; STATES; STATUTES, 7.

## ORDINANCES.

See MUNICIPAL CORPORATIONS, 7-11.

## PARENT AND CHILD.

**1. A FATHER IS ENTITLED TO THE SERVICES OF HIS MINOR CHILD** residing in his family, and may therefore recover of any one who deprives him of those services, though the consent of the father was given, if such consent was procured by fraud. *Lawyer v. Fritcher*, 521.

**2. DAMAGES — PUNITIVE, FOR LOSS OF SERVICES OF CHILD.** — If a man, by representing himself to be unmarried, obtains the consent of the parents of a minor daughter to his marriage with her, and to her living with him, and he thereafter lives with her, declaring that she is his wife, until she, learning of his inability to contract marriage because of his having a wife from whom he had not been divorced, commits suicide, her father may sustain an action for the loss of the services of his daughter, and the jury may award him punitive damages. *Lawyer v. Fritcher*, 521.

See ASSUMPT; CONTRACTS, 1; GIFTS, 3; LEGACIES, 4; NEGLIGENCE, 8; WITNESSES, 2.

## PAROL EVIDENCE.

See CONTRACTS, 9; EVIDENCE.

## PAROL AGREEMENT.

See BOUNDARIES, 2-6.

## PARTIES.

See TRUSTS, 15, 17.

## PARTITION.

See CO-TENANCY, 3; POWERS.

## PARTNERSHIP.

1. **SALE OF FIRM ASSETS TO PAY INDIVIDUAL DEBT, WHEN VALID AS AGAINST FIRM CREDITORS.** — The members of an insolvent partnership may unite in selling the firm assets in payment of their individual debts; and such sale, if made in good faith, for full value, and without fraud, is valid as against the partnership creditors, when an insolvent is given the right to prefer creditors. *Ellison v. Lucas*, 242.
2. **PAYMENT OF INDIVIDUAL DEBT WITH FIRM ASSETS — CONSIDERATION — PRESUMPTION.** — Where the members of a partnership assign the firm assets in good faith and for full value to a third person in satisfaction of their individual debts, and the assignment recites that the consideration is a given sum of money, it will be presumed that the consideration named is the actual value of the property conveyed. *Ellison v. Lucas*, 242.
3. **ASSIGNMENT OF FIRM ASSETS IN PAYMENT OF INDIVIDUAL DEBTS — EXCESS VOID AS TO FIRM CREDITORS.** — Where the members of a partnership unite in transferring the firm assets to a third person in payment of their individual debts, but the value of one of the partner's share in the firm assets considerably exceeds in amount his debt paid by the assignment, this amounts to a donation of the excess to his partner, and to that extent is void as to the partnership creditors. *Ellison v. Lucas*, 242.
4. **TRANSFER BY INSOLVENT PARTNERSHIP OF ALL ITS ASSETS AFTER DISSOLUTION VOID AS AGAINST ITS CREDITORS, WHEN.** — Although after the dissolution of a partnership, even though made insolvent by the sale and transfer of all its assets, the creditors cannot, as a general rule, follow the property into the hands of the purchaser, yet this is true only where the transaction has been in good faith, and not for fraudulent purposes. If such transfer is fraudulent, it is void, does not affect the rights of the partnership creditors, and does not place the property beyond their reach. *Reyburn v. Mitchell*, 350.
5. **VOID CONTRACT BY SURVIVING PARTNER — PUBLIC POLICY.** — Where a member of a partnership dies leaving minor children, an agreement entered into between his surviving partner, his widow, and his individual creditors, that the surviving partner shall retain the partnership property without administration, and shall pay a *pro rata* share of the individual indebtedness of his deceased partner, is void as against public policy, the policy of the probate law, and the interests of such minor children; and a promise based upon such agreement cannot be enforced. *Oos v. Grubb*, 303.
6. **JUDGMENT, ACCEPTANCE OF NOTE OF PARTNER FOR, NOT RELEASE OF PARTNERSHIP, WHEN.** — The release of a judgment against a firm, and the acceptance of the individual note of one of the partners, does not release the partnership from liability, in the absence of any proof that he intended to release it. *Reyburn v. Mitchell*, 350.
7. **PRIORITY OF PARTNERSHIP CREDITORS NOT OVERREACHED BY MORTGAGE OF PARTNERSHIP PROPERTY BY ONE PARTNER, WHEN.** — A mortgage of his right, title, and interest in partnership property, made by an individual

partner to secure an antecedent debt of his, though with the consent of the other partners, will not overreach the general lien of the partners, or the priority of partnership creditors. *Reyburn v. Mitchell*, 350.

2. **PARTNERSHIP PROPERTY, HOW APPLIED TO PAYMENT OF DEBTS.** — One partner cannot transfer the partnership property for the satisfaction of his individual debt without the consent or acquiescence of the other partners, for each partner has the right, in equity, to have the property of the firm applied to the payment of the partnership debts. And as the firm creditors derive the right to have the partnership assets appropriated to the satisfaction of their debts in preference to creditors of the individual partners through these equities among the partners themselves, such right can only exist so long as the partnership itself continues, and consequently a *bona fide* waiver of their equitable rights by the partners cuts off the derivative equities of the creditors. *Reyburn v. Mitchell*, 350.

3. **SETTLEMENT OF ACCOUNT — JURISDICTION.** — The court of common pleas has exclusive jurisdiction to entertain a bill for the settlement of a partnership account after the death of one of the partners. *Weigley v. Coffman*, 667.

See EVIDENCE, 17; TRUSTS, 14; USURY.

### PARTY-WALLS.

See COVENANTS, 3.

### PATENTS.

1. **PATENT RIGHT — TITLE ACQUIRED BY LESSEE.** — A patent right is an incorporeal right protected by letters patent to use an appliance discovered by the patentee for the production of a certain result. Such right is clearly distinguishable from the patented appliance, and the lessee of such appliance, without more, does not acquire any title to or ownership in the patent under which it was made. *Commonwealth v. Central etc. Tel. Co.*, 677.
2. **PATENT RIGHT — TITLE ACQUIRED BY LESSEE.** — The exclusive right secured by letters patent to the inventor is an incorporeal right, clearly distinguishable from the ownership of the patented appliance, and the lessee of such appliance, without more, acquires no title to or ownership in the patent under which it was made. *Commonwealth v. Edison Electric Light Co.*, 683.
3. **TAXATION — PATENT RIGHTS — LESSEE OF PATENTED APPLIANCE.** — The capital stock of a telephone company, issued by it in consideration of its exclusive right, as lessee, to use patented telephone appliances within a certain territory, the patentee retaining the exclusive ownership of the patent and absolute control over the manufacture of the leased appliances, is not an investment in patent rights by the lessee, and such stock is therefore subject to taxation by the state. *Commonwealth v. Central etc. Tel. Co.*, 677.

See TAXES, 4.

### PAUPERS.

See CONSTITUTIONS, 1.

**PAYMENT.**

See **BANKS AND BANKING**, 1-7; **DEBTOR AND CREDITOR**, 4; **INSURANCE**, 4;  
**VENDOR AND PURCHASER**, 4.

**PENDENTE LITE.**

See **INJUNCTIONS**, 5.

**PERPETUITIES.**

See **LEGACIES**, 2; **WILLS**, 5.

**PERSONAL PROPERTY.**

**CONFLICT OF LAWS.** — **PERSONAL PROPERTY** IS SUBJECT TO THE LAW OF THE OWNER'S DOMICILE with respect to its disposition *inter vivos* and its transmission by last will and testament. *Cross v. United States Trust Co.*, 597.

See **CRIMINAL LAW**, 2; **GIFTS**; **LEGACIES**.

**PETITION.**

See **APPEAL**, 6; **IRRIGATION DISTRICTS**, 4, 5.

**PHARMACY.**

See **STATUTES**, 2.

**PHYSICIANS AND SURGEONS.**

1. A **PHYSICIAN OR SURGEON** ENGAGES TO BRING TO THE TREATMENT OF HIS PATIENT care, skill, and knowledge, and if he waits too long before undertaking a necessary amputation, he must be held to have known of the probable consequences of such delay, and is therefore answerable for the damages resulting therefrom. *Du Bois v. Decker*, 529.
2. **LIABILITY OF, WHEN ACTING GRATUITOUSLY.** — The fact that the services of a physician or surgeon were rendered gratuitously does not affect his duty to exercise reasonable and ordinary care, skill, and knowledge, nor his liability to respond for damages resulting from his not exercising them. *Du Bois v. Decker*, 529.
3. **THE FAILURE OF A PATIENT TO OBEY THE INSTRUCTIONS** of his surgeon is excusable, if they are not such as a surgeon of ordinary skill would adopt or sanction. The patient is not required to submit to treatment which is plainly injurious and unskillful, placing in peril his health, and perhaps his life. *Du Bois v. Decker*, 529.
4. **BEFORE A SURGEON CAN RELIEVE HIMSELF FROM LIABILITY**, on the ground that his patient did not submit to the course recommended, he must show that it was proper and adapted to the end in view. *Du Bois v. Decker*, 529.
5. **THE FAILURE OF A PATIENT TO OBEY THE INSTRUCTIONS** of his physician cannot destroy his right to recover for previous malpractice, but it may be considered as tending to mitigate damages. *Du Bois v. Decker*, 529.

See **COVENANTS**, 1; **EXECUTORS AND ADMINISTRATORS**, 2.

**PLEADING.**

1. **DUPLOITY IN INFORMATION FOR MISDEMEANOR, TOO LATE AFTER VERDICT TO RAISE OBJECTION OF.** — It is too late after verdict to object to duplicity in an information for a misdemeanor. *State v. Armstrong*, 261.



**2. PLEADINGS, AMENDMENT OF, SHOULD BE ALLOWED, WHEN.** — It is proper to permit a petition to be amended so as to make it correspond with changes that have occurred since the commencement of the suit, and to allow new parties to be brought in who have become interested in the property in controversy. *Reyburn v. Mitchell*, 350.

**2. EVIDENCE — VARIANCE.** — Where a witness testifies that four named causes produced the injury complained of, while the complaint alleges but two, it is error to strike out that part of the evidence not covered by the pleadings and allow the remainder to stand. The whole evidence should be stricken out; but such error is cured by the subsequent consent of all parties that the whole evidence might stand as first introduced. *Atlanta etc. R. R. Co. v. Kimberly*, 231.

**See CORPORATIONS, 6; EJECTMENT, 1, 2; INJUNCTIONS, 2; IRRIGATION DISTRICTS, 4; JUDGMENTS, 4, 11, 12; JURISDICTION, 1; LABEL, 2, 8; REPLEVIN; SEDUCTION, 2.**

### PLEDGE.

**1. COLLATERAL SECURITIES.** — BROKER HOLDING COLLATERAL SECURITIES IS NOT REQUIRED TO REALIZE UPON THEM before bringing an action to recover judgment upon a debt for the securing. *De Cordova v. Barnum*, 533.

**2. CONVERSION OF PLEDGED STOCK.** — Where, in an action to recover for the conversion of stock valued at eighteen thousand dollars, and pledged as security for a loan of eight thousand dollars, it appears that the principal of the loan was paid at the time of demand and refusal, the pledgee is guilty of conversion, although at that time there was interest to the amount of thirty-seven dollars due on the loan, which was overlooked by both parties, and neither demanded, tendered, nor paid. *Kullman v. Grunbaum*, 150.

**See BILLS OF LADING, 2, 2.**

### POLICE POWER.

**See STATUTES, 1.**

### POLLUTION.

**See WATERCOURSES, 12, 12.**

### POSSESSION.

**See ADVERSE POSSESSION; BURGLARY, 2; CO-TENANCY, 1; EMINENCE, 2, 5; GIFT, 4; INNKEEPERS, 6; RAILROADS, 11; REAL PROPERTY, 2.**

### POSTHUMOUS CHILD.

**See NEGLIGENCE, 8.**

### POST-OFFICE.

**See CONTRACTS, 7.**

### POWERS.

**TENTATIVE POWER OF SALE DOES NOT GIVE POWER TO MAKE PARTITION.** Nor will a power to make partition be implied from a power of sale, merely because a sale can be more advantageously made after partition. *Carr, Petitioner*, 773.

**See BENEFICIAL ASSOCIATIONS, 3; ESTOPPEL, 2.**

**PREFERENCES.****See DEBTOR AND CREDITOR, 4.****PRESUMPTION.****See BURGLARY, 2; COURTS, 3; EVIDENCE, 1; HIGHWAYS, 3; INFANTS, 2; INSANE PERSONS, 1; INSURANCE, 6, 7; LEGISLATURE, 3; PARTNERSHIP, 2; RAILROADS, 21; WILLS, 1.****PRINCIPAL AND AGENT.****See AGENCY.****PRIVATE WAYS.**

1. **RIGHT TO INCLOSE.** — A person entitled to a right of way cannot successfully claim that he has also a right to the air and ventilation coming through and from the space which constituted the alley-way at the time of the grant. Where a grant or reservation is of a right of way merely, it carries with it, as incidentals thereto, only such light and air as are necessary to its convenient enjoyment. *Grafton v. Moir*, 533.
2. **IF A RIGHT OF WAY IS RESERVED, BUT NOT SPECIFICALLY DEFINED,** the way need only be such as is reasonably necessary and convenient for the purpose for which it was granted. *Grafton v. Moir*, 533.
3. **THE RESERVATION OF A RIGHT OF WAY THROUGH AND OVER AN ALLEY-WAY** does not reserve the alley-way itself, but merely the right to pass through it. *Grafton v. Moir*, 533.
4. **OWNER OF LAND OVER WHICH ANOTHER HAS A RIGHT OF WAY MAY USE IT** in any manner that he sees fit, provided he does not unreasonably interfere with the latter's reasonable use in passing to and fro. *Grafton v. Moir*, 533.
5. **THE OWNER OF LAND OVER WHICH ANOTHER HAS A RIGHT OF WAY HAS THE RIGHT** to construct buildings over such way, provided they are such as will permit of its use for the purposes of passing to and fro in the manner which the parties are presumed to have had in view when the grant of the right of way was made. *Grafton v. Moir*, 533.
6. **A RIGHT OF WAY TO A STABLE** does not carry with it such light and air as the stable requires, but such as the right of way needs for its convenient enjoyment. *Grafton v. Moir*, 533.
7. **WIDTH OF.** — A right of way along a private road or alley-way does not give the owner of such way a right to insist that it shall not be altered and the width decreased, unless the whole is necessary for his purpose. *Grafton v. Moir*, 533.

**PRIVILEGE.****See ATTORNEY AND CLIENT, 2.****PRIVILEGED COMMUNICATIONS.****See LIBEL, 3; SLANDER, 2.****PROBATE COURTS.****See COURTS, 4; TRESPASS TO TRY TITLE.****PROBATE SALES.****See EXECUTORS AND ADMINISTRATORS, 5-12.**

## PROCESS.

**NON-RESIDENT SUITOR ATTENDING COURT NOT EXEMPT FROM SERVICE OF SUMMONS.** — In Rhode Island a non-resident suitor attending court in the prosecution of a suit is not exempt from the service of a summons against him in another suit. *Baldwin v. Emerson*, 741.

**See ABATEMENT; EQUITY, 4; JUDGMENTS, 1, 14; MALICIOUS PROSECUTION, 2.**

## PROFITS.

**See GIFTS, 4; MORTGAGES, 1.**

## PROMISSORY NOTES.

**See NEGOTIABLE INSTRUMENTS.**

## PROPERTY.

**See MALICIOUS PROSECUTION,**

## PROSECUTING ATTORNEY.

**See TRIAL, 5.**

## PUBLIC LANDS.

**OFFICERS — MINISTERIAL ACT UNDER SPECIAL STATUTE — ISSUANCE OF LAND CERTIFICATE.** — The act of the commissioner of a land-office in issuing a land certificate, as directed by special statute, is merely ministerial, and does not determine the ownership, nor divert the title from the person intended by the statute to receive it. *Lyne v. Sanford*, 852.

## PUBLIC POLICY.

**See CONTRACTS, 7; DEVISES, 9; INSURANCE, 14; PARTNERSHIP, 5.**

## PUBLIC SQUARES.

**See DEDICATION; JUDGMENTS, 9-11; MUNICIPAL CORPORATIONS, 5, 6.**

## QUASI CORPORATIONS.

**See SCHOOLS, 1.**

## QUANTUM MERUIT.

**See ASSUMPSIT.**

## QUESTION OF FACT.

**See RAILROADS, 7.**

## QUESTION OF LAW.

**See EQUITY, 1.**

## QUIET TITLE.

**See CLOUD ON TITLE.**

## QUITCLAIM DEED.

**See DEBTOR AND CREDITOR, 2.**

## RAILROADS.

1. **DEEDS — RIGHT OF WAY — SPECIAL DAMAGES — INJUNCTION.** — Where a railroad company has obtained a deed to a right of way under representations that it is to be used for main-line purposes alone, and it is afterwards used for side-tracks, such use will not be enjoined. The grantor is, however, entitled to recover damages for the injury sustained in excess of those which arise from the proper use of the principal line of the road. *Donisthorpe v. Fremont etc. R. R. Co.*, 387.
2. **EMINENT DOMAIN — SPECIAL DAMAGES — OPERATION OF RAILROAD.** — Where an owner has sustained special damages by the construction and operation of a railroad near his land and in close proximity to his house, in excess of the damages sustained by the public generally, he is entitled to recover compensation therefor; and the noise, jar to his building, smoke, soot, and cinders from passing engines and trains are proper elements of damage. *Omaha etc. R. R. Co. v. Janeczek*, 399.
3. **BRAKEMAN'S AUTHORITY — BURDEN OF PROOF.** — A brakeman upon a railroad train has no implied authority to eject a trespasser from the cars; and in an action against the railroad company, the burden of proof is upon the party injured, to show that in ejecting him the brakeman acted within the scope of his authority. *International etc. Ry. Co. v. Anderson*, 902.
4. **CONDUCTOR AND BRAKEMAN, IMPLIED AUTHORITY OF, TO EJECT TRESPASSERS.** — The conductor on a railroad train has implied authority to eject trespassers therefrom, and may call to his aid the other servants of the company; but a brakeman has no such implied authority, unless called upon by the conductor to act. *International etc. R'y Co. v. Anderson*, 902.
5. **MASTER AND SERVANT — ACT DONE TO FRIGHTEN.** — An engineer in charge of a locomotive, who, with intent to frighten passengers on a street-car, backs the locomotive towards and so near such car that they become frightened, and jump off and are injured, is not acting in the prosecution of his master's business, and the latter, therefore, is not liable for the damages resulting to such passengers. *Stephenson v. Southern Pac. Co.*, 222.
6. **NEGLIGENCE — LIABILITY FOR INCOMPETENCY OF EMPLOYER.** — Where, in an action to recover for an injury to a railway brakeman, caused by a defective track, and received while he was attempting to uncouple cars, the evidence shows that the employee to whom the railroad company confided the duty to keep its track in repair was incompetent, and fails to show that such brakeman knew of its defective condition at the time and place of the accident, the negligence of the company is established, and a recovery may be had for the injury. *Texas etc. R'y Co. v. Robertson*, 929.
7. **NEGLIGENCE — QUESTION OF FACT.** — When, in an action against a railway company to recover for the death of a brakeman, alleged to have been caused by a defective brake-beam and switch, the evidence in support of the allegation is conflicting, the question of the negligence of the company and the contributory negligence of the deceased is properly left for consideration and determination by the jury. *Texas etc. R'y Co. v. Robertson*, 929.
8. **CONTRIBUTORY NEGLIGENCE — UNCOUPLING MOVING CARS.** — The fact that a brakeman is injured while attempting to uncouple moving cars does not of itself establish negligence contributing to his injury, when the evidence shows that this is a usual and often necessary practice, and

fails to show that it could not have been done without injury but for other defects in the road-bed of such nature as were likely to make a brakeman stumble and fall. *Texas etc. R'y Co. v. Robertson*, 929.

9. **MASTER AND SERVANT — INDEPENDENT CONTRACTOR — LIABILITY OF CORPORATE EMPLOYER.** — A railroad company may employ an independent contractor to construct its road, and a contract of this character is not such a delegation of its chartered rights as will render the company liable for the unauthorized wrongs of the contractor or his servants while engaged in the work. *Atlanta etc. R. R. Co. v. Kimberly*, 231.

10. **MASTER AND SERVANT — INDEPENDENT CONTRACTOR — LIABILITY OF EMPLOYER FOR NEGLIGENCE OF.** — Where a railroad company lawfully employs an independent contractor to construct its road, retaining no control over him or the work, he is not the agent or servant of the company, and it is presumed that he will do the work in a lawful manner. If he does it illegally, he, and not the company, is liable therefor. *Atlanta etc. R. R. Co. v. Kimberly*, 231.

11. **MASTER AND SERVANT — INDEPENDENT CONTRACTOR — RATIFICATION — LIABILITY OF EMPLOYER FOR NUISANCE CREATED BY.** — A railroad company, which has employed an independent contractor to construct its road, retaining no control over him, except to see that the road is built according to contract, is not liable for an injury resulting from a nuisance created by such contractor, not necessarily incident to the construction of the road; and if the company is not aware of the existence of the nuisance, and the possession of the road has not been delivered to it at the time of the injury complained of, there is no such ratification of the contractor's wrongful acts as will render it liable therefor. *Atlanta etc. R. R. Co. v. Kimberly*, 231.

12. **COMMON CARRIERS OF LIVE-STOCK — DUTY TO FEED AND WATER IN EVERY KIND OF WEATHER.** — A railway company carrying live-stock must provide suitable places where they can be fed and watered in every kind of weather, without injury, so far as this can be done by the use of proper care. For a failure to perform this duty, it must respond in damages; nor will its liability be excused by the muddy condition of its feeding-places, caused by recent rains. *International etc. R'y Co. v. McRae*, 926.

13. **COMMON CARRIERS OF LIVE-STOCK — EVIDENCE OF CONTRACT IN REDUCTION OF DAMAGES.** — A written instrument signed by a shipper of live-stock and the conductor of the train, and also by an attesting witness, showing the condition of the live-stock at its date, is inadmissible in evidence until it is proved by such attesting witness, or his absence is accounted for. Until then, the evidence of such conductor as to its contents is also inadmissible, for the purpose of reducing damages. *International etc. R'y Co. v. McRae*, 926.

14. **DAMAGES FOR MENTAL ANGUISH — NEGLIGENT DELAY IN DELIVERY OF CORPSE.** — A widow is entitled to recover for mental suffering as an element of damages, in an action against a railroad company for its negligent delay in the delivery of the body of her dead husband, shipped upon such railway. *Hale v. Bonner*, 850.

15. **COMMON CARRIERS — LIABILITY FOR FAILURE TO DELIVER — DEMAND.** — It is the duty of a railway company, as a common carrier, to deliver the goods to the true owner or his assignee at its peril, and its failure to so do constitutes a conversion for which suit may be maintained without previous demand. *Missouri Pac. R'y Co. v. Heidenheimer*, 861.

16. **NEGLECTENCE — LIABILITY OF, FOR FIRE.** — In an action for loss by fire caused by sparks from the locomotive-engine of a railroad company, negligence on the part of the company is the gist of the action and the burden of proof is upon the plaintiff to prove it. The mere fact of the existence of the fire will not charge the company with either negligence or want of skill. *Henderson v. Philadelphia etc. R'y Co.*, 652.
17. **LIABILITY FOR FIRES — EVIDENCE.** — In an action to recover for the escape of fire from an unidentified locomotive, evidence that the company's locomotives generally, or many of them, at or about the time of the fire, threw sparks of unusual size and kindled numerous fires upon that part of the road, is admissible to sustain or strengthen the inference that the fire originated from the negligence of the company complained against. Evidence of this character must be limited to about the time of the fire, and if it relates to a period six months preceding the fire or is unlimited as to time, it is inadmissible. *Henderson v. Philadelphia etc. R'y Co.*, 652.
18. **LIABILITY FOR FIRES — EVIDENCE.** — Where a railroad fire complained of is shown to have been caused, or may have been caused, by sparks from an engine, unknown and unidentified, or by one of several engines, some of which are unidentified, evidence that sparks and burning coals were frequently dropped by engines passing on the same road about the time of the fire in question, and either before or after, is relevant and competent to show habitual negligence on the part of the company, and to make it probable that the damage complained of proceeded from the same cause. *Henderson v. Philadelphia etc. R'y Co.*, 652.
19. **LIABILITY FOR FIRES — EVIDENCE.** — In actions to recover for the escape of fire from locomotive-engines, the burden is upon the complainant to prove negligence in their construction, operation, or management. This fact need not be established by direct or positive proof, but may be shown by circumstantial evidence. *Henderson v. Philadelphia etc. R'y Co.*, 652.
20. **LIABILITY FOR FIRES — EVIDENCE.** — Where a railroad fire complained of is shown to have been caused, or in the nature of the case could only have been caused, by sparks from an engine, which is known and identified, the evidence should be confined to the condition of that engine, its management, and its practical operation; and evidence tending to prove defects in other engines of the company is irrelevant, and should be excluded. The evidence must also be confined to the operation of the identified engine at or about the time of the occurrence of the fire. *Henderson v. Philadelphia etc. R'y Co.*, 652.
21. **LIABILITY FOR FIRES — NEGLIGENCE — SPARK-ARRESTERS — PRESUMPTION.** — In case of loss by fire, fairly attributable to sparks from a railroad company's locomotive, the absence of a spark-arrester is *prima facie* evidence of negligence on the part of the company; and although the emission of sparks is not of itself evidence of negligence, the fact that they cause a fire at a considerable distance raises the presumption that the engine is not provided with a sufficient spark-arrester. *Henderson v. Philadelphia etc. R'y Co.*, 652.

See CARRIERS; DEEDS, 9; EVIDENCE, 6-8; MASTER AND SERVANT, 18; WATERCOURSES, 9.

#### RATIFICATION.

See RAILROADS, 11; TAXES, 5.

## REAL PROPERTY.

**1. LANDLORD AND TENANT — BUILDING STANDING ON LEASED LAND IS CHATTEL REAL, WHEN.** — Where a lease of land on which stands a building owned by the lessee contains a provision that such building may be removed by the lessee within a reasonable time after the expiration of the term, if the lessor shall not pay its value, to be determined by arbitration, such building is, during the running of the term of the lease, annexed to the land, and the interest of the lessee in both building and land is a chattel real. *Newhoff v. Mayo*, 455.

**2. CRIMINAL LAW.** — THE OWNER OF PROPERTY HAS A RIGHT TO DEFEND ITS POSSESSION, and if necessary, to destroy the means used to invade that possession. *People v. Kane*, 574.

See BOUNDARIES, 4; EASEMENTS; WITNESSES, 3, 4.

## REBATE

See INSURANCE, 19.

## RECEIVERS.

**RECEIVER OF RENTS AND PROFITS OF MORTGAGED PREMISES CANNOT BE APPOINTED PENDING FORECLOSURE.** — Where a mortgage of land does not contain any provision subjecting the rents and profits of the mortgaged premises to a lien to secure the payment of the mortgage debt, and the complaint does not contain any allegation of waste of the mortgaged premises, the mortgagee is not entitled to have a receiver appointed to collect the rents and profits pending his suit for foreclosure. *Hardin v. Hardin*, 786.

See APPEAL, 1; CONTRACTS, 2, 3.

## RECORDS.

See APPEAL, 1; COURTS, 4; EVIDENCE, 10, 17; HOMESTEAD, 1; INJUNCTIONS, 4; IRRIGATION DISTRICTS, 4; LIENS; NEW TRIAL, 3.

## REDELIVERY BOND.

See EXECUTION, 7.

## REFEREES.

**REFEREE'S REPORT, APPEAL LIES FROM DECREE CONFIRMING, WHEN.** — An appeal lies from a final decree confirming a referee's report, although no exception was taken thereto, where the matter involved in the appeal was not submitted to nor considered by the referee. *Hardin v. Hardin*, 784.

## REGISTRATION.

See DEEDS, 3.

## REHEARING.

See JUDGMENTS, 5.

## RENTS.

See GIFTS, 4; MORTGAGES, 1; RECEIVERS; WATERCOURSES, 7.



**REPLEVIN.**

**PLEADING.** — Any defense to an action of replevin may be proved under a general denial. *White v. Conway*, 330.

**REPUBLICATION.**

See **WILLS**, 2.

**RESCISSIOM.**

See **CONTRACTS**, 10.

**RESERVATION.**

See **DEEDS**, 4.

**RES GESTÆ.**

See **EVIDENCE**, 4-8; **NEW TRIAL**, 4.

**RES JUDICATA.**

See **JUDGMENTS**, 2-12.

**RESTRAINT OF MARRIAGE.**

See **DEVISES**, 8.

**RESTRICTIONS.**

See **DEVISES**, 5, 6.

**REVENUE.**

See **CORPORATIONS**, 7.

**RIGHT OF WAY.**

See **DEEDS**, 9; **LANDLORD AND TENANT**, 1.

**RIPARIAN RIGHTS.**

See **WATERCOURSES**.

**SALES.**

See **AGENCY**, 1; **BILLS OF LADING**; **CONTRACTS**, 9; **VENDOR AND PURCHASER**.

**SATISFACTION.**

See **ATTORNEY AND CLIENT**, 1.

**SCHOOLS.**

1. **SCHOOL DISTRICT — MUNICIPAL CORPORATIONS.** — An organized school district, with power to sue and be sued, is merely a quasi corporation created for educational purposes, and is not, strictly speaking, a municipal corporation. *Frans v. Young*, 412.

2. **OFFICERS OF SCHOOL DISTRICT — OATH OF OFFICE.** — School district officers are not municipal officers, and therefore are not required to take an oath of office, in the absence of express provision of law to that effect. *Frans v. Young*, 412.

See **LIMITATIONS OF ACTIONS**, 1; **OFFICE AND OFFICERS**, 1, 5.

**SEDUCTION.**

- 1. SEDUCTION UNDER PROMISE OF MARRIAGE — INDICTMENT FOR, WHEN SUFFICIENT.** — An indictment for seduction under a promise of marriage, which alleges that the defendant seduced the prosecutrix under promise of marriage, is sufficient without alleging that she promised to marry him. *State v. Eckler*, 372.
- 2. IN PROSECUTION FOR, STATE MUST PROVE GOOD REPUTE OF PROSECUTRIX.** — In a prosecution for seduction under a promise of marriage, the state is required to allege and prove in the first instance the good repute of the prosecutrix. *State v. Eckler*, 372.
- 3. EVIDENCE ADMISSIBLE ON TRIAL FOR.** — Upon the trial of an indictment for seduction under a promise of marriage, the defendant may ask the prosecutrix if she had ever authorized any one to accept money to settle the suit. *State v. Eckler*, 372.

**SELF-CRIMINATION.**

See CONTEMPT, 1.

**SEPARATE PROPERTY.**

See BOUNDARIES, 5.

**SERVICES.**

**INTERFERING WITH RIGHT TO.** — He who unlawfully interferes with another's right to services, whether they be the services of a male or female, a minor or an adult, is liable for actual compensatory damages, in the manner and upon the same grounds that he would be liable for the unlawful interference with any other property right of another. *Lewyer v. Fritcher*, 521.

See ASSUMPT; FRAUDULENT CONVEYANCES, 2; PARENT AND CHILD.

**SHERIFFS.**

- A SHERIFF LEVYING ON THE PROPERTY OF A THIRD PERSON,** while acting under a writ of attachment, must be regarded as incurring a liability by the doing of an act in his official capacity and in virtue of his office. *Bishop v. McGillis*, 63.

**SLANDER.**

- 1. WORDS CHARGING UNMARRIED WOMAN WITH FORNICATION ACTIONABLE PER SE.** — An accusation is actionable that falsely charges an offense which, if proved, may subject the party charged therewith to a punishment not ignominious, but which brings disgrace. And therefore words charging an unmarried woman with fornication are actionable *per se* in Rhode Island, although the punishment for fornication in that state is simply a fine of not over ten dollars, which is recoverable by complaint and warrant, not by indictment. *Kelley v. Flaherty*, 739.
- 2. CANDIDATE FOR OFFICE, FALSE STATEMENTS DEFAMATORY OF, NOT PRIVILEGED.** — False statements defamatory of the character of a candidate for public office, although made in good faith, are not privileged. *Smith v. Burrus*, 329.

See MALICIOUS PROSECUTION, 16.

**SPECIFIC PERFORMANCE.**

See CONTRACTS, 4; DEEDS, 1.

## STATES.

1. **NEGLIGENCE — LIABILITY OF STATE.** — A state is not answerable to one of its officers or servants for damages resulting to him from the misconduct or negligence of another officer or servant. The doctrine of *respondens superior* does not prevail against the sovereign, in the necessary employment of public agents. *Bourn v. Hart*, 203.
  2. **STATE IS NOT LIABLE FOR THE NEGLIGENCE OR MISFEASANCE** of its officers or agents, except when such liability is voluntarily assumed by its legislature. *Bourn v. Hart*, 203.
- See CORPORATIONS, 9; INTERSTATE COMMERCE; IRRIGATION DISTRICTS, 8-10; JUDGMENTS, 8, 10; LIMITATIONS OF ACTIONS, 4; MUNICIPAL CORPORATIONS, 5; PATENTS, 3; SEDUCTION, 2; STATUTES, 1, 5, 8.

## STATUTES.

1. **CONSTITUTIONAL LAW.** — THE POLICE POWER OF A STATE EXTENDS to all regulations affecting the lives, limbs, health, comfort, good order, morals, peace, and safety of society. *State v. Heinemann*, 34.
2. **CONSTITUTIONAL LAW — PHARMACY.** — A STATUTE REQUIRING THAT EVERY PERSON KEEPING A PHARMACY store or shop for retailing, compounding, and dispensing drugs, medicines, or poisons shall be a registered pharmacist, or have in his employ a registered pharmacist, and providing that every person desiring to become a registered pharmacist shall possess certain qualifications prescribed in the act, to be ascertained as therein provided, and that a registration fee, not exceeding two dollars, shall be paid, is constitutional. *State v. Heinemann*, 34.
3. **CONSTITUTIONAL LAW — LEGISLATION CONFERRING INCIDENTAL ADVANTAGES UPON INDIVIDUALS.** — Whenever it is apparent from the scope of a statute that its object is for the benefit of the public, and that the means by which the benefit is to be attained are of a public character, the act will be upheld, even though incidental advantages may accrue to individuals beyond those enjoyed by the general public. *In re Madera Irr. Dist.*, 106.
4. **CONSTITUTIONAL LAW — GENERAL LAW OF LOCAL APPLICATION — IRRIGATION DISTRICT.** — Whenever a special district of the state requires special legislation therefor, as for irrigation purposes, the legislature may, by general law, authorize the organization of such district into a public corporation, with such powers of government as it may choose to confer upon it which are peculiarly appropriate to such an organization. It is no valid objection to such law that there is but a single district to which it is applicable at the time of its enactment. *In re Madera Irr. Dist.*, 106.
5. **CONSTITUTIONAL LAW — GENERAL LAWS OF LOCAL APPLICATION.** — The legislature may enact general laws which, from their nature, will be capable of enforcement in particular portions of the state only; or it may by other general laws authorize the organization of municipal corporations which, from the nature of the functions intrusted to them, can find occasion for organization in certain portions of the state only; and it may by such general laws provide for the organization of such or as many species of municipal corporations as, in its judgment, are demanded by the public welfare of the state and its people. *In re Madera Irr. Dist.*, 106.
6. **CONSTITUTIONAL LAW — LEGISLATION FOR LOCAL IMPROVEMENT.** — A statute authorizing an expenditure for a local improvement is a legislative

declaration that such expenditure is for a public purpose and for the public welfare, and such action is not to be disregarded by the courts upon an assumption by them that such legislation is unwise, or that it may be injurious to some of the individuals who are affected by it. *In re Madera Irr. Dist.*, 106.

7. **CONSTITUTIONAL LAW — GIFTS FORBIDDEN.** — A statute appropriating money to pay the claim of a guard at a state prison, for personal injury resulting to him from the loss of his arm while in the discharge of his duties, is forbidden by the clause of the constitution of California declaring that the legislature shall have no power to make any gift of any public money to any individual, or to grant any extra compensation or allowance to any public officer or servant of the state, after the service has been performed, or the contract has been entered into, and performed in whole or in part. *Bourn v. Hart*, 203.

8. **CONSTITUTIONAL LAW — APPROPRIATION FOR "WORLD'S FAIR."** — A statute appropriating money to meet the expenses of erecting buildings and maintaining an exhibit of the products of the state of California at the World's Fair Columbian Exposition at Chicago, and providing that such appropriation is to be expended and disbursed under the exclusive charge and control of a commission to be appointed by the governor of the state, is valid as making an appropriation for a public use, and is not in conflict with a constitutional provision forbidding the appropriation of state money to any institution not under the exclusive management and control of the state, as a state institution. *Daggett v. Colgan*, 95.

See **BOUNDARIES**, 4; **CONSTITUTIONS**, 1; **CORPORATIONS**, 5; **COURTS**, 2; **DEDICATION**; **DEEDS**, 3; **EXECUTORS AND ADMINISTRATORS**, 6-8; **GIFTS**, 3; **INSURANCE**, 18, 19; **INTERSTATE COMMERCE**; **IRRIGATION DISTRICTS**; **LIMITATIONS OF ACTIONS**, 3; **MASTER AND SERVANT**, 5; **MUNICIPAL CORPORATIONS**, 8; **NEGOTIABLE INSTRUMENTS**, 8; **PUBLIC LANDS**; **TAXES**, 2; **WATERCOURSES**; **WITNESSES**, 1.

### STATUTE OF FRAUDS.

See **BOUNDARIES**, 4; **CONTRACTS**, 2, 3; **EVIDENCE**, 2.

### STATUTE OF LIMITATION.

See **LIMITATIONS OF ACTIONS**.

### STOCKS.

See **BROKERS**; **CORPORATIONS**, 2-7; **DURESS**, 2, 3; **PATENTS**, 3; **TAXES**, 4.

### STOPPAGE IN TRANSITU.

See **BILLS OF LADING**; **CARRIERS**.

### STREETS.

See **HIGHWAYS**, 1-3; **MUNICIPAL CORPORATIONS**, 5, 12, 13.

### SUBROGATION.

See **DEBTOR AND CREDITOR**, 1-3; **HOMESTEAD**, 2; **LIENS**.

### SUBSCRIPTION.

See **CORPORATIONS**, 2-7.

## SUICIDE.

See HOMICIDE, 1; PARENT AND CHILD, 2.

## SUMMONS.

See ABATEMENT; PROCESS.

## SURFACE WATERS.

See WATERCOURSES, 9-11.

## SURGEONS.

See PHYSICIANS AND SURGEONS.

## SURVEYS.

See BOUNDARIES.

## SURVIVAL OF ACTIONS.

See ABATEMENT.

## TAXES.

1. **CONSTITUTIONAL LAW — POWER OF TAXATION.** — The power of the legislature in matters of taxation is unlimited, except as restricted by constitutional provisions. It may provide by assessment for a local improvement, and determine the basis of apportionment without regard to any special local benefit to the tax-payer. It may also determine in advance what property will be benefited, by designating the district in which the tax is to be collected, as well as the property upon which it is to be imposed. *In re Madera Irr. Dist.*, 106.
2. **CONSTITUTIONAL LAW — TAXATION FOR LOCAL IMPROVEMENT.** — It is not necessary to the validity of a tax imposed for local improvement to show that all property within the district may be actually benefited, and even if it appears that no benefit is received by such property, it is not thereby exempted from bearing its portion of the assessment, nor is the act imposing the tax unconstitutional because it provides that such property shall be assessed. *In re Madera Irr. Dist.*, 106.
3. **CAPITAL STOCK OF CORPORATION.** — A corporation engaged in producing electricity and selling it for the generation of light, heat, or power, is not a manufacturing corporation, within the meaning of a statute exempting from taxation the capital stock of manufacturing corporations not engaged in the manufacture of liquors or of gas. *Commonwealth v. Edison Electric Light Co.*, 683.
4. **PATENT RIGHTS — STOCK OF CORPORATION.** — The capital stock of one corporation paid to another corporation as the consideration for the right to use a patented appliance for the production of electricity within a certain territory as lessee, the patentee retaining exclusive ownership of the patent and the exclusive right to manufacture and dispose of the patented appliance leased, is not an investment in patent rights, and such stock is therefore subject to taxation by the state. *Commonwealth v. Edison Electric Light Co.*, 683.
5. **TAX SALE OF LAND, OWNER RATIFIES BY ACCEPTING PART OF PROCEEDS OF, WHEN.** — Where an owner of land sold for taxes, with knowledge of all the facts, accepts a part of the proceeds of the sale, he thereby recognizes

and ratifies its validity, and cannot afterwards be heard to question it. *Ogden v. McLaughlin*, 369.

**See** CORPORATIONS, 7, 9, 11; DEEDS, 3; EVIDENCE, 9; INTERSTATE COMMERCE; IRRIGATION DISTRICTS, 7, 10; MUNICIPAL CORPORATIONS, 9-11; PATENTS, 3.

### TELEGRAPHS.

- 1. DUTY TO ACCEPT AND TRANSMIT ALL LAWFUL MESSAGES.** — Any dispatch which a telegraph company can lawfully transmit by its own choice it must transmit and deliver, and it cannot reject any dispatch on account of its subject-matter, unless by sending it the company would or might subject itself or its servants either to indictment or civil action. *Gray v. Western U. Tel. Co.*, 259.
- 2. DUTY TO TRANSMIT AND DELIVER MESSAGES RELATING TO "FUTURES."** — It is not illegal for telegraph companies to receive and transmit messages relating to speculative transactions in "futures," when that class of business has not been made penal by statute; and when messages of that nature are offered and paid for, they must accept, transmit, and promptly deliver them, although the damages for failure to correctly transmit and promptly deliver them cannot be measured by the result of such speculative dealings. *Gray v. Western U. Tel. Co.*, 259.
- 3. DUTY TO DELIVER MESSAGE ADDRESSED TO ONE PERSON IN CARE OF ANOTHER.** — Where a telegram is addressed to one person in care of another, the telegraph company must use reasonable care to find and deliver to the party addressed upon a failure to deliver to the party in whose care the message is sent, or it must respond in damages for its negligence in this respect, especially when the party addressed is well known at the place where the message is received for delivery. *Western U. Tel. Co. v. Houghton*, 918.
- 4. DUTY TO DELIVER MESSAGE TO PARTY ADDRESSED.** — Where a telegram is addressed to one party in care of another, the non-existence of the party in whose care the message is sent will not relieve the telegraph company of its duty to exercise reasonable care to find and deliver the message to the party addressed. *Western U. Tel. Co. v. Houghton*, 918.
- 5. LIABILITY FOR DELAY IN DELIVERY OF MESSAGE RELATING TO "FUTURES."** — A telegraph company cannot escape its liability for negligent delay in delivering a message received for transmission and paid for, on the ground that it relates to a sale of "futures," unless it is made a crime or tort to speculate in "futures," or would subject the company to indictment or civil action to receive and transmit a message in relation thereto. *Gray v. Western U. Tel. Co.*, 259.
- 6. DELAY IN DELIVERY OF TELEGRAM — SPECIAL DAMAGES.** — To authorize a recovery of special damages for delay in the delivery of a message, the telegraph company must have had notice, either from the face of the message or otherwise, at the time of receiving it, of the circumstances out of which special damages might arise. *Gulf etc. R'y Co. v. Loontj*, 891.
- 7. DELAY IN DELIVERY OF TELEGRAM — MEASURE OF DAMAGES.** — In an action by a building contractor against a telegraph company for its negligent delay in delivering a message sent by him requesting the forwarding of plans and specifications, with notice to the company that they were wanted to aid him in buying building material, the measure of damages is the amount paid for the telegram, the value of time lost, and expenses incurred by the delay, and any advance in the price of material within such time as by the use of reasonable diligence the contractor

could have had the plans and specifications forwarded to him after discovering the delay. *Gulf R'y Co. v. Loomie*, 891.

6. **DELAY IN DELIVERY OF MESSAGE—DAMAGES FOR MENTAL ANGUISH.**—Where a telegraph company receives a prepaid message from a mother to her son, consisting of the words, "Your step-father died this morning," with notice that it is important that it be sent at once, she may recover damages for the mental anguish sustained from the non-delivery of the message. *Western U. Tel. Co. v. Nations*, 914.
7. **DAMAGES FOR NON-DELIVERY OF TELEGRAM—WHEN EXCESSIVE.**—A verdict for four thousand five hundred dollars against a telegraph company for the non-delivery of a telegram from a mother to her husband relating to their son, and reading, "Lush is worse; come home," is excessive and should be set aside, although the father did not reach this son until after his death. *Western U. Tel. Co. v. Houghton*, 918.

### TELEPHONES.

See EVIDENCE, 14; INTERSTATE COMMERCE; PATENTS, 8.

### TENANTS IN COMMON.

See CO-TENANCY.

### THEFT.

See LARCENY.

### THREATS.

See CONTRACTS, 11, 12; DURESS.

### TITLE INSURANCE COMPANY.

See VENDOR AND PURCHASER, 2.

### TOLLS.

See CORPORATIONS, 7.

### TORTS.

See DAMAGES, 3; HUSBAND AND WIFE, 3; MASTER AND SERVANT, 4, 8, 9; RAILROADS, 9; TELEGRAPHS, 5.

### TOWNSHIPS.

See HIGHWAYS, 6.

### TRADE-MARKS.

1. **TRADE-MARKS ARE FOR THE PURPOSE** of pointing out the source, origin, or ownership of the goods to which they are applied, or the dealer's place of business; and they usually include the name of the manufacturer or dealer, though they sometimes consist of some novel device, arbitrary character, or fancy word, applied without special meaning, and which by use and reputation comes to serve the same purpose. *Gessler v. Grieb*, 20.
2. **A TRADE MARK OR NAME CAN PROTECT ONLY THE OWNER'S TRADE OR BUSINESS**, and cannot do this to the extent of precluding others from carrying on a like trade or business, provided they do not so carry it on as to mislead incautious persons into the belief that they are dealing



with him or purchasing the products of his manufacture. *Gessler v. Grieb*, 20.

3. THE WORDS "HEADACHE WAFERS," REGISTERED AND USED as a part of a trade-mark, cannot give any exclusive right to the use of those words. *Gessler v. Grieb*, 20.

4. LABEL — INJUNCTION. — An unincorporated association known as the "Cigar Makers' International Union," formed for promoting "the mental, moral, and physical welfare of its members," but which is not a manufacturer nor dealer in cigars, cannot acquire a trade-mark in a label adopted by it, distinguishing and discriminating between the work of union and non-union workmen, and an injunction will not lie to restrain the use of a spurious imitation of such label by a member of a subordinate cigar-makers' union. *McVey v. Brendel*, 625.

5. SIMILARITY OF PACKAGES AND OF DIRECTIONS. — The fact that one who manufactures and sells wafers for headache puts them up in boxes similar in form, and accompanied by labels containing directions for use substantially identical to those used by another manufacturer, does not constitute an infringement of the latter's trade-mark, where his name is not used, and the true name of the manufacturer and his place of business are printed on each label, and there is nothing to indicate that he is selling his goods as and for the goods manufactured and sold by another person. *Gessler v. Grieb*, 20.

6. OWNERSHIP. — An unincorporated association formed "for promoting the mental, moral, and physical welfare of its members," but which is neither a manufacturer nor a dealer, cannot acquire a trade-mark in a label adopted by it. *McVey v. Brendel*, 625.

## TRESPASS.

MEASURE OF DAMAGES. — In an action for injurious trespass to land, the measure of damages is the cost of restoring the land injured within the period of the statute of limitations to its former condition, and if the cost of restoration will equal or exceed the value of the land injured, then its value is the measure of damages. The rule as to damages for a taking by eminent domain is not applicable in such case. *Lenta v. Carnegie*, 717.

## TRESPASS TO TRY TITLE.

EVIDENCE — PROBATE SALES — RECORD AS EVIDENCE OF LAND SOLD. — The record of a probate court, showing the sale of land described only as the "S. Burks survey," is inadmissible in an action of trespass to try title to show title to another and distinct tract of land known as the "S. Banks survey"; nor is parol evidence that the land sold was appraised, advertised, and auctioned as the "Banks survey" admissible in such case to show that such survey was intended to be sold, and to thus contradict the record of the probate court. *Collins v. Ball*, 877.

See INJUNCTIONS, 1; MALICIOUS PROSECUTION, 5; NUISANCE, 1.

## TRIAL.

1. EVIDENCE SUFFICIENT TO SUBMIT QUESTION TO JURY. — To justify the submission of any question of fact to a jury, the proof must be sufficient to raise more than a mere conjecture or surmise that the fact is as alleged. It must be such that a rational, well-constructed mind can reasonably draw from it the conclusion that the fact exists, and when the evidence

- is not sufficient to justify such an inference, the court may properly refuse to submit the question to the jury. *Janin v. London etc. Bank*, 82.
2. EVIDENCE OF A WITNESS MAY BE DISREGARDED, though he is not contradicted, if he is a party or is interested, and therefore the court must submit to the jury the question of his credibility. Hence, where a plaintiff seeks to recover as a *bona fide* purchaser of a note which was obtained from the maker by fraud, and testifies to facts tending to show that he is such a holder, the question of his good faith cannot be withdrawn from the jury. *Joy v. Diefsendorf*, 484.
  3. EVIDENCE AS TO HOW FAR A CHILD COULD HAVE BEEN SEEN at a time and place designated is properly excluded, because it is for the jury to determine that question from all the facts and circumstances disclosed to them. *Hermes v. Chicago etc. R'y Co.*, 69.
  4. WHOLE OF CHARGE TO JURY TO BE CONSIDERED TOGETHER. — The whole of a judge's charge to the jury must be considered together, and where, when so considered, it correctly states the law, it will be upheld, although a particular sentence thereof, if considered by itself, might be open to objection. *State v. Levelle*, 799.
  5. PROSECUTING OFFICER, IMPROPER REMARKS BY, IN ARGUMENT SHOULD BE AVOIDED. — Prosecuting officers should avoid remarks or arguments which are calculated to improperly influence juries to go outside the evidence and instructions to determine the grade of the offense for which a conviction should be had. An argument by such an officer that a conviction for petit larceny would impose on the county and tax-payers large expenses should therefore be avoided. *State v. Warford*, 322.
  6. FINDINGS — VERDICT — INTERPRETATION. — Where the findings will fairly admit of an interpretation which will make them harmonious with one another and with the general verdict, that interpretation should be given, rather than one which will overturn and destroy both the findings and the verdict. *Jackson v. Linnington*, 300.
  7. PRACTICE — EVIDENCE. — WHERE A WITNESS BEING SWIFT in responding to a question makes an answer which is not admissible, the party injured thereby should move to strike it out, and failing to do this, cannot afterwards complain. *Bigelow v. Sickles*, 25.
  8. NONSUIT NOT PROPER WHERE THERE IS SOME EVIDENCE OF NEGLIGENCE. — In an action to recover damages for the alleged negligence of the defendant, it is not proper to grant a nonsuit where there is some testimony tending to show an omission of duty on his part. *Carter v. Oliver Oil Co.*, 815.
- See BOUNDARIES, 2, 6; DAMAGES, 3; JURISDICTION, 1; LABEL, 10; MALICIOUS PROSECUTION, 3, 11, 14; NEGLIGENCE, 7; NEW TRIAL; RAILROADS, 7; WITNESSES, 5.

## TRUSTS.

1. HOW CREATED. — No certain form of words is required in the creation of a trust, but the intention must be complete and plainly manifest, and not derived from loose and equivocal expressions of the parties, made at different times and upon different occasions. Any words which indicate with sufficient certainty a purpose to create a trust will be effective in so doing, without the use of the words "trust" or "trustees." *Estab. of Smith*, 641.
2. FACTS WHICH CONSTITUTE. — The facts that a person purchases bonds, payable to bearer, and places them in an envelope containing the indorse

ment over his initials that they are held "for Tom Smith Kelly," while the entries in the purchaser's account and memorandum-books over his signature show that the bonds were "bought for," "are the property of," and "belong to," his "nephew and godson Thomas Smith Kelly," and that the interest on such bonds was placed to the credit of the latter, together with a declaration made by the purchaser to the father of said Kelly, that "he had laid by or appropriated some bonds for Tom," and the fact that the written declarations of such purchaser were carefully preserved by him until his death, are sufficient to establish his intention to hold the bonds as trustee for his nephew, and to vest the latter with the beneficial ownership of them as against the decedent's residuary legatees. *Estate of Smith*, 641.

2. **GIFTS — IMPERFECT GIFT WILL CREATE TRUST.** — What is clearly intended as a gift, but is imperfect as such, will not be given effect by construing it as a declaration of trust. Equity will not perfect an imperfect gift, nor impute a trust where none was in contemplation. *Estate of Smith*, 641.
3. **AN ENFORCEABLE TRUST** is one in which some person or class of persons has a right to all or a part of a designated fund, and can demand its conveyance to them, and in case such demand is refused, may sue the trustees in a court of equity, and compel compliance with the demand. *Tilden v. Green*, 487.
4. **WHEN A TRUST IS INTENDED**, it will be equally effectual whether the donor transfers the title to a trustee, or declares that he himself holds the property for the purposes of the trust. *Estate of Smith*, 641.
5. **EXECUTORY TRUST** is ONE in which the limitations are imperfectly declared and the donor's intention is expressed in such general terms that something not fully declared is required to be done in order to complete and perfect the trust and to give it effect. *Estate of Smith*, 641.
7. **EXECUTED TRUST** is ONE in which the limitations are fully and perfectly declared. *Estate of Smith*, 641.
8. **CONTINUANCE OF.** — Where, by a will, property is directed to be held in trust and invested, and the trustees are to pay a specified sum monthly to the testator's son for his support and maintenance, and that of the latter's daughter during her minority, provided she resides with certain relatives after she attains the age of eight years and until she is twenty-five years old, and if she survives her father she is to receive one half of the trust funds, and the remainder shall be divided among testator's heirs at law, but in no event shall testator's son be vested with or control any part of the principal, the trust thus created continues after the death of the daughter and during the life of her father. *Matter of Smith*, 586.
9. **A TRUST WITHOUT A BENEFICIARY** who can claim its enforcement is void, and this objection is not obviated by the existence in the trustees of a power to select a beneficiary, unless the claim of the persons in whose favor the power may be exercised has been designated with such certainty that the court can ascertain who were the objects of the power. *Tilden v. Green*, 487.
10. **TRUST POWER**, to be valid in the state of New York, must designate some person or a class of persons, other than the grantee of the power, as its objects, and it must be exercised for the sole benefit of such designated beneficiary, and its execution must be compellable in equity. A non-enforceable trust power is an impossibility under our laws, unless, by the

- instrument creating it, it is expressly made to depend for its execution on the will of the grantee. *Tilden v. Green*, 487.
11. **CY-PRES** — The equitable doctrine of *cy-pres* prevailing in the English court of chancery, and which was applied to gifts for charitable purposes when no beneficiary was named, has no place in the jurisprudence of New York. *Tilden v. Green*, 487.
  12. **WIFE'S EARNINGS — GIFT OF, BY HUSBAND INFERRED, WHEN — RESULTING TRUST.** — Where a husband, free from debt, allows the earnings of his wife to accumulate in the hands of her employer, and he never claims such earnings as his own, an executed gift thereof from him to her will be inferred, and if he subsequently purchases therewith a lot of land, taking the title thereto in his own name, a resulting trust will arise in her favor. *Grantham v. Grantham*, 839.
  13. **TRUSTS IN MERCANTILE BUSINESS — PARTNERSHIP.** — A trust, and not a partnership, is created when a trustee appointed by a court has the entire control and sole management of a mercantile business, for the benefit of the beneficiaries named in the instrument creating the trust, without any right on their part to withdraw their interests. *Connally v. Lyons*, 935.
  14. **PERSONAL LIABILITY OF TRUSTEES.** — **BENEFICIARIES** of a trust are not necessary parties to a suit for a debt incurred by the trustee in the management of the trust, and for which he is personally liable. *Connally v. Lyons*, 935.
  15. **PERSONAL LIABILITY OF TRUSTEE.** — A trustee who carries on a mercantile business with the trust assets, for the benefit of the *cestui que trust*, is responsible to the trust creditors, not only to the extent of the trust assets, but also with his own property. *Connally v. Lyons*, 935.
  16. **PERSONAL LIABILITY OF TRUSTEE.** — A trustee who carries on a mercantile business with the trust assets, for the benefit of the *cestui que trust*, is personally liable for goods purchased by him and charged to the trust without first establishing the account as a debt against the trust estate, nor are the beneficiaries necessary parties to the suit. *Connally v. Lyons*, 935.
  17. **TRUST ESTATE OF TRUSTEE OF EXPRESS TRUST DESCENDS TO HIS PERSONAL REPRESENTATIVE.** — Upon the death of a trustee of an express trust of personal property, the trust estate descends to his personal representative, and an action affecting the trust estate, pending in his own name at the time of his death, may be revived and prosecuted in the name of his executor or administrator, where it does not appear that a successor has been agreed upon or appointed. *Reyburn v. Mitchell*, 350.
- See CORPORATIONS, 8; CO-TENANCY, 2, 3; DEBTOR AND CREDITOR, 3; DEVISES, 1, 2; EQUITY, 3; GIFTS, 1, 3; HOMESTEAD, 2; JUDGMENTS, 8; LEGACIES, 2; MUNICIPAL CORPORATIONS, 6; WILLS, 3, 4.

### TURNPIKES.

See HIGHWAYS, 4.

### USURY.

- A NOTE IS NOT VOID** in the hands of a third person who has purchased it at a discount greater than the legal interest, unless the instrument had no inception between the parties, or was not intended to be available until discounted. Hence the rule is not applicable to a note induced by false representations, whereby the maker was procured to execute it in payment for the interest of a partner in an alleged business firm, under an

agreement that the note was not to be sold or disposed of, but was to be paid out of the proceeds of the business. *Joy v. Diefsendorf*, 484.

### VARIANCE

See **INDICTMENT**, 2.

### VENDOR AND PURCHASER.

1. **AGREEMENT BETWEEN A LAND-OWNER AND ANOTHER PERSON, BY WHICH THE LATTER IS AUTHORIZED**, within a time designated, to sell certain real property and to retain for his commission whatever shall be realized over a price named, creates a relation between the parties more like that of vendor and purchaser than that of principal and agent, and any sale agreed to be made by the latter must be regarded as made in the capacity of vendor, and not as on account of the land-owner. *Robinson v. Easton*, 167.
2. **LAND-OWNER HAS NO RIGHT TO A DEPOSIT PAID ON ACCOUNT OF A SALE** of his land when such sale is made by one who has been given the right to sell the land and retain the proceeds in excess of a sum named, and the sale was upon the express condition that the deposit was to be returned, and the sale canceled, if a title insurance company should refuse to insure the title, and such company had so refused after examining such title, though after such refusal, and after the contract of sale had been canceled, it determined to insure the title. *Robinson v. Easton*, 167.
3. **CONTRACT OF SALE — WAIVER OF FORFEITURE**. — A provision for the forfeiture of a contract for the sale of land for the non-payment of the purchase-money at a certain time is waived by the subsequent execution of a deed to the vendee or his assignee by the original vendor. *Alexander v. Jackson*, 158.
4. **CONTRACT OF SALE — FORFEITURE — DEMAND AND NOTICE**. — When time is not made of the essence of a contract for the sale of land, it is incumbent upon the vendor or his assignee, who would terminate the contract and insist upon a forfeiture, to give notice to the vendee, and a reasonable time within which to do any act required of him. In such case, a mere failure to pay the purchase-money at maturity will not *ipso facto* avoid the agreement; but the vendor must give notice of his intention to forfeit it after demand and refusal to make the required payment. *Alexander v. Jackson*, 158.
5. **MEASURE OF DAMAGES FOR FAILURE OF VENDEE OF LAND TO COMPLETE HIS PURCHASE**. — Where the purchaser at an administrator's sale of real estate refuses to complete his purchase, and the vendor thereupon sells the property for a smaller sum, and brings an action against the first vendee to recover for the breach of his contract, the measure of damages will be the loss of the plaintiff from the default of the defendant, which may or may not be the difference between the two bids and the expense of the second sale. In order to make the vendee liable in *assumpsit* for such difference and expense in case of his default, it should be made a condition of the sale that in such case the property should be resold and the vendee held to pay such difference and expense. *McGuinness v. Whalen*, 763.

See **CONTRACTS**, 8; **DEEDS**, 2; **HOMESTEAD**, 1-3.

### VERIFICATION.

See **CONTEMPT**, 3; **INDICTMENT**, 1.

## VICE-PRINCIPALS.

See MASTER AND SERVANT, 18.

## WAIVER.

See APPEAL, 6; ATTORNEY AND CLIENT, 3; INSURANCE, 4, 13; PARTNERSHIP  
8; VENDOR AND PURCHASER, 2.

## WARRANTY.

See CONTRACTOR, 9; DEBTOR AND CREDITOR, 3; INSURANCE, 11.

## WASTE.

See RECEIVERS.

## WATERCOURSES.

1. STATUTE DECLARING A RIVER TO BE A NAVIGABLE STREAM cannot affect rights of riparian owners or of owners of a dam acquired before the passage of such statute. *Allen v. Weber*, 51.
2. RIPARIAN RIGHTS — FLOW OF STREAM. — Every riparian owner is entitled, as an incident to his land, to the natural flow of the water of a stream running through it, undiminished in quantity, and unimpaired in quality, subject to the reasonable use of the water by those similarly situated, for the ordinary purposes of life. Any essential interference therewith, if wrongful, whether attended with actual damages or not, is actionable. *Clark v. Pennsylvania R. R. Co.*, 710.
3. RIPARIAN RIGHTS — USE OF WATER — DIVERSION. — Every riparian owner has the right to use the water of a stream passing over his land for ordinary domestic purposes, even to the extent of consuming all the water of the stream, but if he materially or sensibly diminishes its quantity by diversion for manufacturing or other purpose, having no necessary relation to the use of his land, he is liable to respond in damages to the lower proprietor. *Clark v. Pennsylvania R. R. Co.*, 710.
4. RIPARIAN RIGHTS — DIVERSION FOR BUSINESS PURPOSES. — The business necessities of a riparian owner, having no necessary relation to the use of his land, will not justify his diversion of the waters of a stream from its natural channel, to the prejudice of a lower proprietor, and for such diversion he is liable to an action for the excessive use of the water. *Clark v. Pennsylvania R. R. Co.*, 710.
5. RIPARIAN RIGHTS — DIVERSION — DAMAGES. — A lower proprietor is entitled to recover nominal damages for the excessive diversion of the water of a stream by an upper owner, without proof of actual injury, but to entitle him to recover special damages, they must be proved by competent evidence. *Clark v. Pennsylvania R. R. Co.*, 710.
6. RIPARIAN RIGHTS — DIVERSION — SPECIAL DAMAGES. — A lower owner can not recover special damages for the diversion of water by an upper owner on the ground that it has interfered with his water power, when he has no means of using such power, has made no attempt to use it, and has given no notice of intention to use it. *Clark v. Pennsylvania R. R. Co.*, 710.
7. RIPARIAN RIGHTS — DIVERSION — SPECIAL DAMAGES — ELEMENTS AND MEASURE OF — EVIDENCE. — In an action to recover special damages for the excessive diversion of water by an upper proprietor, the measure of damages is the injury sustained from the diversion of the water in the use

of the land for the purposes for which it was used, or would have been used but for refusal on due notice to discontinue the diversion. A reduction in rental value from this cause is a proper element of damages, but the rental value of an unoccupied mill site is speculative and inadmissible, and so is the annual rental value of the land based on the sale or diversion of the water by the lower proprietor. *Clark v. Pennsylvania R. R. Co.*, 710.

20. **LAND-OWNERS LIABILITY FOR DIVERTING OVERFLOW.** — A land-owner on the bank of a river who erects on his own land an embankment which increases the overflow in times of flood upon the lands of the opposite proprietor, to the injury of the latter, is liable in damages therefor. *O'Connell v. East Tennessee etc. R'y Co.*, 246.

21. **OVERFLOW NOT SURFACE WATER — LIABILITY FOR OBSTRUCTING OVERFLOW BY RAILROAD EMBANKMENT.** — The surplus waters of a river or watercourse in time of flood do not cease to be part of the watercourse and become surface water when they naturally spread over the adjacent lowlands without well-defined banks or channels, so long as they eventually return to and are discharged through the channel of such watercourse; and a railroad company is liable in damages for obstructing such waters by an embankment on its own land, thus throwing excessive waters upon the land of an adjacent or opposite owner, to his injury. *O'Connell v. East Tennessee etc. R'y Co.*, 246.

22. **SURFACE WATERS.** — One proprietor may turn and divert surface waters from his land onto the land of another, and such other proprietor may in turn divert the same onto the land of his adjacent neighbor, and so on. Each proprietor may thus pass on surface water, and there is no remedy except in doing so. *Johnson v. Chicago etc. R.R. Co.*, 76.

23. **WATERS, SURFACE, RIGHT TO OBSTRUCT.** — The owner of an estate, for the purpose of securing or protecting his reasonable use and enjoyment, may obstruct and divert surface waters thereon, which have come from higher levels, by embankments, ditches, drains, culverts, and other structures; and in so doing may lawfully hinder the natural flow of such waters, and turn the same back upon or off onto or over the lands of other proprietors, without liability for injury ensuing from such obstruction or diversion. *Johnson v. Chicago etc. R. R. Co.*, 76.

24. **RIPARIAN RIGHTS — POLLUTION OF STREAM.** — A manufacturer of coke from coal not mined on his own land is liable in actual damages to a lower proprietor for the pollution of a stream as a necessary incident to his business. *Lentz v. Carnegie*, 717.

25. **RIPARIAN RIGHTS — POLLUTION OF STREAM — MEASURE OF DAMAGES.** — In an action to recover damages against an upper proprietor for the unlawful pollution of a stream, the lower proprietor is entitled to recover only such actual damages as he has sustained within the period of the statute of limitations preceding the action. Injury sustained prior to that time is not a proper element of damages. *Lentz v. Carnegie*, 717.

## WAYS.

See PRIVATE WAYS.

## WILLS.

1. **UNDUE INFLUENCE OVER TESTATOR PRESUMED WHEN.** — Against a beneficiary under a will having the testator under his control, with power to



make his will the will of the testator, especially in a case where the testator has made an unnatural disposition of his property, the law presumes undue influence, and puts upon such beneficiary the burden of showing affirmatively that when the testator made his will he did not exercise his power over the testator to his own advantage, and to the disadvantage of others having an equal or superior claim upon the bounty of the testator. *Carroll v. House*, 469.

2. **UNDUE INFLUENCE, WHAT IS, TEST AND EFFECT OF.** — Whatever constrains a person to do what is against his will, and what he would not do if left to himself, is undue influence, no matter by what means the control is exercised. The extent or degree of the influence is wholly immaterial, for the test is, was the influence, whether powerful or slight, sufficient to destroy free agency, so as to make the act in question the act of another rather than the expression of the mind and heart of the actor? Undue influence exercised by any one, whether he or another gains by its exercise, renders the will or other instrument thus procured worthless. *Carroll v. House*, 469.
  3. **WILL CREATING LEGAL AND ILLEGAL TRUSTS** may be permitted to stand and to be enforced so far as the legal trusts are concerned, if they can be separated from the illegal trusts and upheld without doing injustice or defeating what the testator must be presumed to wish. *Cross v. U. S. Trust Co.*, 597.
  4. **TRUSTS, WILL CONTAINING LAWFUL AND UNLAWFUL.** — When some of the trusts of a will are legal and others illegal, if they are so connected as to constitute an entire scheme, so that the presumed wishes of the testator would be defeated if one portion was retained and other portions rejected, or if manifest injustice would result from such construction to the beneficiaries, or some of them, then all the trusts must be considered together, and all must be held illegal and must fall. *Tilden v. Green*, 487.
  5. **PERPETUITIES.** — A provision in the will of a married woman, by which the absolute ownership of property is suspended during the life of her four children, and for a still longer time if any of them die leaving grandchildren not yet twenty-five years of age at the death of the last surviving child of the testatrix, is void, as creating a perpetuity forbidden by the laws of the state of New York. *Cross v. United States Trust Co.*, 597.
  6. **IN CONSTRUING A WILL**, the court can only aid the testator's intent and purpose. It cannot devise a new scheme or make a new will. *Tilden v. Green*, 487.
  7. **FOR THE PURPOSE OF ASCERTAINING THE TESTATOR'S INTENTION**, the whole will must be considered, including the provisions admitted to be void. *Tilden v. Green*, 487.
  8. **CODICIL AS REPUBLICATION.** — Where a codicil to a will is so executed as to operate a republication of the will, both will be read and construed together as one entire instrument, and the will will be considered as of the date of the codicil. *Hawke v. Bayart*, 391.
- See ASSUMPTIT; DEVISES; LEGACIES; PERSONAL PROPERTY; POWERS; TRUSTS, 2.

#### WITNESSES

1. **CONSTITUTIONAL LAW.** — **WITNESS NOT EXCUSED FROM DISCLOSING NAMES OF OTHERS WHO HAVE BEEN GAMBLING, WHEN.** — The provision of a state constitution, that "no person shall be compelled to testify against

himself in a criminal case," will not excuse a witness before a grand jury from disclosing the names of persons other than himself who have been gambling in the county within a year last past, where a statute of such state provides that such testimony given by one who has himself been gambling "shall in no case be used against him." The protection of such statute is co-extensive with that intended to be afforded by the constitution. *Ex parte Buskett*, 378.

2. **COMPETENCY — RELATIONSHIP.** — A son is a competent witness in his own behalf to answer the testimony of his brother acting as administrator of their father, as to matters which occurred between them previously to the death of their father, not in his presence, and in which he did not in any way participate. *Hudson v. Hudson*, 270.
3. **COMPETENCY — VALUE OF LAND.** — A witness called to testify as to damages to land, who is without definite knowledge as to its market value both before and after the injury complained of, is incompetent to testify as to the extent to which its market value has been affected, or as to the amount of damage it has sustained. *Gallagher v. Kemmerer*, 673.
4. **CROSS-EXAMINATION — KNOWLEDGE AND CREDIBILITY.** — A witness who has placed a value upon the property in dispute may be asked, upon cross-examination, for the purpose of testing his fairness, knowledge, and credibility, if he does not know of sales of similar property in the same vicinity at a much less price than that named by him. *Lantz v. Carnegie*, 717.
5. **EVIDENCE — EXPERTS.** — A **HYPOTHETICAL QUESTION TO AN EXPERT**, WHICH EXCLUDES from his consideration facts already proved, should not be permitted, when the excluded facts are necessary to enable him to form an intelligent opinion. *Vosburg v. Putney*, 47.

See **ATTORNEY AND CLIENT**, 2, 3; **CONTEMPT**, 1; **CORPORATIONS**, 1; **GIFTS**, 2; **RAILROADS**, 13; **TRIAL**, 2, 9.

## WORDS AND PHRASES.

See **DEFINITIONS**.

## WRIT OF SEQUESTRATION.

See **DAMAGES**, 1; **HUSBAND AND WIFE**, 2.

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